# *TEXAS REVIEW* *of* *LAW & POLITICS*

VOL. 14, NO. 1 FALL 2009 PAGES 1-207

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AN IRRATIONAL PUBLIC POLICY
*Lino A. Graglia*

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# LAW & POLITICS

VOL. 14, NO. 1 | FALL 2009 | PAGES 1–207

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# PREFACE

As the current administration continues to react to the economy by nationalizing whole industries, the health care debate rages, and terrorists attempt to scare the nation, we at the *Review* reaffirm our commitment to rational policies from a limited government, a free market, and the belief that the people are sovereign. We ask the government to stop acting like a services provider and to once again behave like the Republic our founders so wisely created. We also recognize wholeheartedly that it is our responsibility, as the next generation of lawyers and legal thinkers, to protect the freedoms we have been given in this great nation.

In this spirit, our first article, *Birthright Citizenship for Children of Illegal Aliens: an Irrational Public Policy,* provides a critique of the government's current policy that allows children of illegal aliens born in the United States to automatically receive American citizenship. In it, Professor Lino A. Graglia shows how this policy is inconsistent with immigration law and public concerns; and is based on incorrect understandings of both the Thirteenth and Fourteenth Amendments of the Constitution.

Continuing the theme of Fourteenth Amendment analysis, in our second article, *Getting Beyond Guns: Context for the Coming Debate over Privileges or Immunities,* Clark M. Neily and Robert J. McNamara discuss the original purpose of the Fourteenth Amendment's Privileges or Immunities clause, and how the Court's Judicial Activism rendered it a dead-letter in the *Slaughter-House Cases.* Mr. Neily and Mr. McNamara make this analysis in light of the pressing question left open by *D.C. v. Heller*: whether the Right to Bear Arms is protected against infringement by the States as well as by the Federal Government. The *Heller* question provides the Court an opportunity to correct the mistake of *Slaughter-House.*

Gary Thompson and Paul Wilkinson also examine the Court's Fourteenth Amendment jurisprudence in *Set the Default to Open:* Plessy's *Meaning in the Twenty-First Century and How Technology puts the Individual Back at the Center of Life, Liberty, and Government,* showing how the balance has progressively shifted away from individual rights and towards the Government's aggrandizement of power. Mr. Thompson and Mr. Wilkinson argue that technology can restore individual rights because of its potential to empower the individual and efficiently return delivery of services to the private sphere, thus curtailing the growth of

government and maintaining more accountability to the people.

In a different take on the problem of Judicial Activism, Professor Heather Scribner discusses the rise of Judicial Activism over time—from the Marshall Court of the famous *Marbury v. Madison* case through the recent high-water mark decision of *Boumediene v. Bush*—in her article, *A Fundamental Misconception of Separation of Powers:* Boumediene v. Bush. Professor Scribner cautions the reader about the danger of the Court's new view of Judicial Review and urges a re-invigoration of the Political Question Doctrine, especially in areas like national security that clearly belong to the political branches.

In *Ninth Circuit Discrimination Case Could Change the Ground Rules for Everyone,* Sarah Kirk analyzes the struggle over class-certification in sexual discrimination cases within the context of the recent Ninth Circuit case, *Dukes v. Walmart.* Ms. Kirk shows how vitally important it is for employees to be able to defend themselves with individual hearings, something they are unable to do if class certifications become too permissive. Ms. Kirk calls on the Supreme Court to resolve this struggle by hearing *Dukes.*

Finally, we present a Note by our Managing Editor, Shane Pennington, exploring the distinction between "cases" and "controversies" in Article III of the Constitution with Professor Akhil Amar's intratextualist approach. In *Cases, Controversies, and the Textualist Commitment to Giving Every Word of the Constitution Meaning,* Mr. Pennington argues that Professor Amar's vision of the Original Jurisdiction Clause is inconsistent with an intratextualist reading of "cases" and "controversies." The *Review* respectfully invites Professor Amar to respond to Mr. Pennington's analysis.

Although there have been many liberal changes in government in the last year, we continue to look forward to the future, confident that conservative and libertarian leaders are continuing to rise up, put forth rational policies, and protect our freedoms. I would like to thank the *Review's* staff for their hard work, our authors for their excellent contributions, and Adam and Tara Ross for their continued assistance.

Amy Davis
*Editor in Chief*

Austin, Texas
December 2009

# BIRTHRIGHT CITIZENSHIP FOR CHILDREN OF ILLEGAL ALIENS: AN IRRATIONAL PUBLIC POLICY

LINO A. GRAGLIA*

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## I. INTRODUCTION

One of the most serious problems the country faces today, in the opinion of most Americans, is the problem of illegal immigration.[1] The usual estimate is that nearly twelve million illegal aliens,[2] mostly from Mexico,[3] are now in the United States. This problem is so serious that it has driven the nation to the extreme solution of beginning construction of a fence or wall along the 2,000 miles of our southern border at the cost of billions of dollars.[4] Popular opposition to illegal immigration is so strong that both major-party presidential candidates in the recent election found it necessary to affirm their opposition.[5]

At the same time, there is the apparent paradox that American law, as currently understood, provides an enormous inducement to illegal immigration: namely, an automatic grant of American citizenship to the children of illegal immigrants born in this country. As a result, it has been estimated that over two-thirds of all births in Los Angeles public hospitals,[6] more

1. *See, e.g.*, The Federation for American Immigration Reform (FAIR), Immigration Facts, Public Opinion Polls on Immigration, http://www.fairus.org/site/PageNavigator/facts/public_opinion/ (last visited Dec. 16, 2009) (listing a variety of poll statistics on U.S. voters' opinions about immigration).

2. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., TRENDS IN UNAUTHORIZED IMMIGRATION: UNDOCUMENTED INFLOW NOW TRAILS LEGAL INFLOW at i (2008), http://pewhispanic.org/files/reports/94.pdf.

3. JEFFREY S. PASSEL, PEW HISPANIC CTR., UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS: BACKGROUND BRIEFING PREPARED FOR TASK FORCE ON IMMIGRATION AND AMERICA'S FUTURE 4 (2005), http://pewhispanic.org/files/reports/46.pdf (stating that 59% of illegal immigrants are from Mexico).

4. GOV'T ACCOUNTABILITY OFF., REPORT TO CONGRESSIONAL REQUESTERS: SECURE BORDER INITIATIVE: TECHNOLOGY DEPLOYMENT DELAYS PERSIST AND THE IMPACT OF BORDER FENCING HAS NOT BEEN ASSESSED 3 (2009), http://www.gao.gov/new.items/d09896.pdf.

5. *See, e.g.*, *Where Clinton, Obama, and McCain Stand on Immigration*, U.S. NEWS & WORLD REP., Mar. 17, 2008, http://www.usnews.com/articles/news/campaign-2008/2008/03/17/where-clinton-obama-and-mccain-stand-on-immigration.html (last visited Dec. 16, 2009) (discussing the candidates' different views and agreements on different issues related to immigration).

6. *Societal and Legal Issues Surrounding Children Born in the United States to Illegal Alien Parents: J. Hearing Before the Subcomm. on Immigration and Claims and the Subcomm. on the Constitution of the Comm. on the Judiciary*, 104th Cong. 22 (1995) [hereinafter *1995 Joint Hearing*] (statement of Rep. Elton Gallegly) (pointing out that an estimated 250,000 citizens were children of illegal alien mothers in Los Angeles County and that for "the State of California, the estimated welfare and health costs" of such children is "estimated to be over $500 million annually," not counting the "largest cost of all . . . providing a public education.").

than one-half of all births in Los Angeles,[7] and nearly 10% of all births in the nation in recent years were to illegal immigrant mothers.[8] Many of these mothers frankly admitted that the reason they entered illegally was to give birth to an American citizen.[9]

A parent can hardly do more for a child than make him or her an American citizen, entitled to all the advantages of the American welfare state.[10] Nor need doing so even be entirely altruistic. Illegal alien parents with an American-citizen child remain subject to deportation, but that deportation becomes less likely. They will be able to appeal to an immigration judge, an administrative court, and ultimately a federal court to argue that deportation would subject the American-citizen child to "extreme hardship," a recognized ground for suspension of deportation, as it would potentially deprive the child of the benefits of his or her American citizenship.[11]

Perhaps even more importantly if the deported parents opt to take the American-citizen child with them, the child can return to this country for permanent residence at any time. The child can then, upon becoming an adult, serve as what is known in immigration law as an "anchor child," the basis for a claim that his or her parents be admitted and granted permanent resident status. The parents will then ordinarily be admitted without regard to quota limitations.[12]

Illegal immigrant parents also benefit, of course, from the welfare and other benefits to which their citizen child is entitled. One court has held, for example, that the benefits that were due under the Aid to Families with Dependent Children Act to a birthright citizen living in a family with illegal aliens had to include the needs of the illegal alien mother and siblings.[13]

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7. *Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 109th Cong. 2 (2005) [hereinafter *2005 Hearing*] (statement of Rep. Lamar Smith).

8. *Id.* at 1 (statement of Rep. John Hostettler).

9. *1995 Joint Hearing*, *supra* note 6, at 35.

10. *See id.* at 25 (statement of Rep. Brian P. Bilbray) ("[O]ver 96,000 babies of illegal aliens were born in California in 1992. These children then qualify for benefits including Medicaid, AFDC, WIC, and SSI.").

11. PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 110–11 (Yale Univ. Press 1985).

12. *Id.* at 111.

13. Darces v. Woods, 679 P.2d 458, 465 (Cal. 1984).

Nearly half of illegal-immigrant households are couples with children,[14] 73% of which have an American-citizen child.[15]

The apparent arbitrariness of birthright citizenship came to public attention recently in the case of Yaser Esam Hamdi. In 2001, Hamdi was captured as a fighter for the Taliban in a battle with United States-supported forces in Afghanistan.[16] He was held as an enemy combatant in military prisons in Afghanistan and then transferred to the United States Naval Base in Guantanamo Bay, Cuba.[17] It was subsequently discovered that Hamdi was born in Louisiana in 1980 to citizens of Saudi Arabia who were residing in the United States on a temporary visa.[18] Shortly after his birth, he returned with his parents to Saudi Arabia and never returned to this country. On the assumption that he was an American citizen,[19] he was released from Guantanamo and transferred to a naval brig in Norfolk, Virginia.[20] From there, he was able to wage a legal battle that ultimately reached the United States Supreme Court, which held that he had a habeas corpus right to challenge his detention.[21]

It is difficult to imagine a more irrational and self-defeating legal system than one which makes unauthorized entry into this country a criminal offense and simultaneously provides perhaps the greatest possible inducement to illegal entry. How can such a legal system have come to be and be permitted to continue? The answer, its defenders no doubt will tell you, is the Constitution, the last resort for defenders of untenable positions.[22] Justice Robert Jackson's famous reply to this argument was that the Constitution is not a "suicide pact."[23]

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14. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 5 (2009), http://pewhispanic.org/files/reports/107.pdf.

15. *Id.* at i.

16. Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).

17. *Id.*

18. *Id.*; Howard Sutherland, *Citizen Hamdi: The Case Against Birthright Citizenship*, THE AM. CONSERVATIVE, Sept. 27, 2004, http://www.amconmag.com/article/2004/sep/27/00021/ (last visited Dec. 6, 2009).

19. *Hamdi*, 542 U.S. at 510; *But see Id.* at 554 (Scalia, J., dissenting ) (referring to Hamdi as only a "presumed American citizen.").

20. *See 2005 Hearing, supra* note 7, at 59–61 (statement of John C. Eastman).

21. *Hamdi*, 542 U.S. at 533–34.

22. For example, in a television debate on school busing for racial integration some years ago, I asked Arthur Fleming, then Chairman of the United States Civil Rights Commission, why he favored forced busing to increase school racial integration when it was clear that because of 'white flight' it actually resulted in less integration. "Because," he said, "it is necessary . . . to enforce and implement the Constitution," which in his

## II. CONSTITUTIONAL AND STATUTORY DEFINITIONS OF CITIZENSHIP

The basis of the constitutional claim of birthright citizenship is the Citizenship Clause, the first sentence of the first section of the Fourteenth Amendment, which states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[24] Not everyone, therefore, born in the United States is automatically a citizen, but only those "subject to the jurisdiction" of the United States. The basic question becomes what that phrase—the jurisdiction requirement—is properly understood to mean. The Immigration and Nationality Act repeats the Citizenship Clause, making it a provision of statutory law, but not clarifying its meaning.[25] Regulations issued by the Department of Homeland Security and the Department of Justice Executive Office for Immigration Review provide: "[a] person born in the United States to a foreign diplomatic officer accredited to the United States, as a matter of international law, is not subject to the jurisdiction of the United States. That person is not a United States citizen under the Fourteenth Amendment to the Constitution."[26] The apparent assumption is that this is the only limitation on birthright citizenship created by the jurisdiction requirement. No statute, regulation, or other official document, however, explicitly addresses the question of birthright citizenship for children born here of resident illegal aliens.

How, then, should the jurisdiction requirement of the Citizenship Clause be interpreted in regard to that question? Like any writing, or at least any law, it should be interpreted to mean what it was intended or understood to mean by those who adopted it—the ratifiers of the Fourteenth Amendment. They could not have considered the question of granting birthright

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opinion, apparently, made the irrationality of the requirement irrelevant. Debate at Dunbar High School, Washington, D.C. (1976), https:/redaudio.cc.utexas.edu;8080/asxgen/law/depts./media/Reels/Graglia1976.wmv (last visited Dec. 16, 2009).

23. Terminiello v. City of Chi., 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

24. U.S. Const. amend. XIV, § 1.

25. 8 U.S.C. § 1401(a) (2009).

26. 8 C.F.R. § 101.3(a) (1) (2009).

citizenship to children of illegal aliens because, for one thing, there were no illegal aliens in 1868, when the amendment was ratified, because there were no restrictions on immigration.[27] It is hard to believe, moreover, that if they had considered it, they would have intended to provide that violators of United States immigration law be given the award of American citizenship for their children born in the United States.

The intended purpose of the Fourteenth Amendment and the Citizenship Clause is not in doubt. In 1856, in the infamous case of *Dred Scott v. Sanford*,[28] the Supreme Court held that blacks, even free blacks, were not citizens of the United States and that a state could not make them citizens. It also held that Congress could not prohibit the extension of slavery to the territories, thereby invalidating the Missouri Compromise.[29] Instead of settling the slavery question, as the Court foolishly thought it was doing, this decision precipitated the Civil War. The Thirteenth Amendment, adopted in 1865, prohibited slavery and involuntary servitude and granted Congress the power to enforce the prohibition by "appropriate legislation."[30] Following emancipation, the Southern states adopted laws, known as "black codes," that limited the basic civil rights of their black residents in many respects.[31] Congress responded by enacting our first civil rights legislation, the Civil Rights Act of 1866.[32] The purpose of the Act was: first, to overrule *Dred Scott* by defining national and state citizenship so as to include blacks and, second, to guarantee those black citizens the same basic civil rights as white citizens.

Congress found authority to enact the 1866 Act in its power to enforce the Thirteenth Amendment.[33] President Andrew Johnson vetoed the act on the ground, among others, that it exceeded Congress's Thirteenth Amendment power.[34] Congress, in the control of the Radical Republicans and with representatives of the South excluded, easily overruled the veto,

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27. SCHUCK & SMITH, *supra* note 11, at 95.

28. 60 U.S. 393 (1856).

29. *Id.*

30. U.S. Const. amend. XIII, § 2.

31. DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 425 (Thomson/West 2nd ed. 2005).

32. Civil Rights Act of 1866, 14 Stat. 27 (1866) (repealed 1866).

33. FARBER & SHERRY, *supra* note 31, at 426.

34. *Id.*

but then proposed the Fourteenth Amendment to remove all doubt as to the Act's validity.[35] The Fourteenth Amendment constitutionalized the 1866 Act in two senses: first, it made clear that Congress was authorized to enact it; and second, it made the Act in effect part of the Constitution, protecting it from repeal by a later Congress.

The 1866 Act begins with a statement from which the Citizenship Clause of the Fourteenth Amendment is derived: "[A]ll persons born in the United States, *and not subject to any foreign power*, excluding Indians not taxed, are hereby declared to be citizens of the United States . . ."[36] The phrase "and not subject to any foreign power" seems clearly to exclude children of resident aliens, legal as well as illegal. The Fourteenth Amendment Citizenship Clause substituted the phrase "and subject to the jurisdiction thereof," but there is no indication of intent to change the original meaning.

In the 39th Congress, which enacted the 1866 Civil Rights Act and proposed the Fourteenth Amendment, the question arose of how to avoid granting birthright citizenship to members of Indian tribes living on reservations.[37] The issue was whether an explicit exclusion of Indians should be written into the Citizenship Clause as it was in the above-quoted first sentence of the 1866 Act.[38] It was decided that this was not necessary, because, although Indians were at least partly subject to the jurisdiction of the United States, they owed allegiance to their tribes, not to the United States.[39]

Senators Lyman Trumbull of Illinois and Jacob Howard of Ohio were the principal authors of the citizenship clauses in both the 1866 Act and the Fourteenth Amendment.[40] Senator Trumbull stated that "subject to the jurisdiction of the United States" meant subject to its "complete" jurisdiction, which means "[n]ot owing allegiance to anybody else."[41] Senator Howard agreed that "jurisdiction" meant a full and complete jurisdiction,

35. *Id.* at 423–54.

36. 14 Stat. 27, ch. 31, § 1 (emphasis added).

37. *See* JOHN C. EASTMAN, HERITAGE FOUNDATION, FROM FEUDALISM TO CONSENT: RETHINKING BIRTHRIGHT CITIZENSHIP 2 (2006), http://www.heritage.org/Research/LegalIssues/upload/95590_1.pdf.

38. *Id.*

39. *Id.*

40. *Id.*

41. CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866).

the same "in extent and quality as applies to every citizen of the United States now."[42] Children born to Indian parents with tribal allegiances were therefore necessarily excluded from birthright citizenship, and explicit exclusion was unnecessary.[43] This reasoning would seem also to exclude birthright citizenship for the children of legal resident aliens and, *a fortiori*, of illegal aliens.[44] It appears, therefore, that the Constitution, far from clearly compelling the grant of birthright citizenship to children of illegal aliens, is better understood as denying the grant.

## III. JUDICIAL INTERPRETATIONS OF CITIZENSHIP

Our constitutional law, however, comes not from the Constitution, but from the Supreme Court. As Charles Evans Hughes, later Chief Justice of the United States, once famously put it, "We are under a Constitution, but the Constitution is what the judges say it is."[45] The question, therefore, is less what the Constitution means than what the Supreme Court is likely to say it means. The answer to that question, as to all litigated constitutional questions, depends almost entirely on the policy preferences of the Justices making the decision. The Supreme Court has never ruled directly on the question of birthright citizenship for the children of resident illegal aliens, but it has spoken to similar issues.

In 1873 in the *Slaughter-House Cases*,[46] the first case to come before the Court involving the then newly enacted Fourteenth Amendment, the Court stated, in dicta, that "[t]he phrase, 'subject to its jurisdiction' was intended to exclude from [birthright citizenship] children of ministers, consuls, and

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42. *Id.* at 2895.

43. *Id.*; SCHUCK & SMITH, *supra* note 11, at 81–82.

44. Earlier, however, in response to a question, Senator Trumbull stated, inconsistently, that citizenship would be granted to the American-born children of Chinese and other legal resident aliens. Schuck and Smith point out that this statement was based on "the expectation that its actual effect would be trivial. On several occasions during the debates, Congress was assured that the number of children of alien parents who would qualify for birthright citizenship under the clause would be *de minimis* and thus of no real concern. This *de minimis* argument could not be credibly made with regard to the Indians, as several senators made clear." SCHUCK & SMITH, *supra* note 11, at 77–79.

45. JOSEPH F. MENEZ & JOHN R. VILE, SUMMARIES OF LEADING CASES ON THE CONSTITUTION 1 (Rowman & Littlefield Publishers, Inc. 2004).

46. 83 U.S. 36 (1873).

*citizens or subjects of foreign States* born within the United States."[47] Much more important, in 1884 in *Elk v. Wilkins*,[48] the Court adopted the view of Senators Trumbull and Howard that a child born to members of an Indian tribe did not have birthright citizenship. Such a child was born in the United States, but not born "subject to the jurisdiction thereof," because that requires that the child be "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance."[49]

It made no difference that the plaintiff "had severed his tribal relation to the Indian tribes, and had fully and completely surrendered himself to the jurisdiction of the United States,"[50] because it did not appear that "the United States accepted his surrender."[51] He could not change his status as an Indian by his "own will without the action or assent of the United States."[52] "To be a citizen of the United States is a political privilege that no one, not born to, can assume without its consent in some form."[53] "[N]o one can become a citizen of a nation without its consent."[54] The decision seemed to establish that American citizenship is not an ascriptive (depending on place of birth), but is a consensual relation, requiring the consent of the United States as well as the individual. This would clearly settle the question of birthright citizenship for children of illegal aliens. There cannot be a more total or forceful denial of consent to a person's citizenship than to make the source of that person's presence in the nation illegal.

The only impediment to this conclusion is the Court's next decision, *United States v. Wong Kim Ark*,[55] in which a divided Court took the opposite approach. The Court explicitly adopted, contrary to *Elk v. Wilkins*, the ascriptive view of the English common law, according to which a person born within the King's realm was necessarily a subject of the King, with only

47. *Id.* at 73 (emphasis added).
48. 112 U.S. 94 (1884).
49. *Id.* at 102.
50. *Id.* at 94.
51. *Id.* at 99.
52. *Id.* at 100.
53. *Id.* at 109.
54. *Id.* at 103.
55. 169 U.S. 649 (1898).

the children of ambassadors and occupying enemy aliens excepted. Thus, the Court held, the Citizenship Clause grants birthright citizenship to children born in the United States of legal resident aliens.

It would seem that the Court was mistaken in interpreting the Citizenship Clause on the basis of the common law ascriptive view, which arose in the feudal context of the position of subjects in a monarchy. That view was based on the assumption that the King's relation to his subjects was as that of father to children, to whom the subject owed perpetual allegiance, which precluded the possibility of expatriation or denaturalization.[56] The American Revolution, however, by definition, rejected the notion of perpetual allegiance.

Two dissenting justices in *Wong Kim Ark* argued that "the rule making locality of birth the criterion of citizenship . . . no more survived the American Revolution than the same rule survived the French Revolution."[57] The dissenters also pointed out, that both the naturalization law of the time and a treaty with China precluded Chinese persons from becoming naturalized citizens.[58] It did not seem credible that by merely giving birth here, a parent could grant the child a citizenship that by both law and treaty Congress and China meant to prohibit.

Whatever the merits of *Wong Kim Ark* as to the children of legal resident aliens and however broad some of its language, it does not authoritatively settle the question of birthright citizenship for children of *illegal* resident aliens. In fact, the Court's adoption of the English common law rule for citizenship could be said to argue *against* birthright citizenship for the children of illegal aliens. Even that rule, the Court noted, denied birthright citizenship to "children of alien enemies, born during and within their hostile occupation" of a country.[59] The Court recognized that even a rule based on soil and physical presence could not rationally be applied to grant birthright citizenship to persons whose presence in a country was not only without the government's consent but in violation of its law.

56. *See* SCHUCK & SMITH, *supra* note 11, at 2 ("[B]irthright citizenship is something of a bastard concept in American ideology . . . [it] originated as a distinctively feudal status intimately linked to medieval notions of sovereignty, legal personality, and allegiance.").

57. 169 U.S. at 710.

58. *Id.* at 730.

59. *Id.* at 655.

This also would seem to preclude the grant of birthright citizenship to the children of illegal aliens. The same, it should be added, is true of children born of legally admitted aliens who have overstayed their visa period or otherwise violated its restrictions.

Although there is no Supreme Court decision on the issue of birthright citizenship for children of illegal aliens, it is referred to in the dicta in a few cases. The most important is *Plyler v. Doe*,[60] a 1982 five-to-four decision, in which the Court reached the remarkable conclusion that Texas is constitutionally required to grant free public education to the children of illegal aliens.[61] The opinion of the Court was by Justice William J. Brennan Jr., perhaps the most liberal-activist Justice in the history of the Court and the source of most of the Court's remarkable innovations in the last half of the twentieth century. The decision, like the grant of birthright citizenship to children of illegal aliens, makes a mockery of our immigration laws, but Justice Brennan never let law, fact, or logic stand in the way of a decision he wanted to reach.[62] He agreed with President Barack Obama that the function of the court was to decide challenging cases on the basis of "empathy."[63]

In a footnote, Justice Brennan interpreted *Wong Kim Ark*[64] as holding that "no plausible distinction . . . can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful."[65] That statement cannot settle the matter, however, because it is not only a pure dictum—a gratuitous statement unnecessary to the decision of the case—but also based on the mistaken premise that *Wong Kim Ark* decided the case of illegal aliens.[66]

The Immigration and Naturalization Service's assumption that the children of illegal aliens have birthright citizenship as a

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60. 457 U.S. 202 (1982).

61. *Id.*

62. *See* LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS 68–74, 178–85 (Cornell Univ. Press 1976).

63. Then-Senator Obama explained that he voted against confirmation of Chief Justice John Roberts due to his belief that judges should decide "truly difficult" cases on the basis of "the depth and breadth of one's empathy." Jess Bravin, *Barack Obama: The Present Is Prologue*, WALL ST. J., Oct. 7, 2008, at A22, *available at* http://online.wsj.com/article/SB122333844642409819.html?mod=article-outset-box.

64. 169 U.S. at 649.

65. *Plyler*, 457 U.S. at 211 n.10.

66. *Wong Kim Ark*, 169 U.S. at 649.

constitutional right is, therefore, clearly subject to challenge and is increasingly being challenged. For example, it was prominently challenged in a 1995 book, CITIZENSHIP WITHOUT CONSENT by Yale law professor Peter Schuck and political science professor Roger Smith.[67] "[B]irthright citizenship's historical and philosophical origins," they argued, "make it strikingly anomalous as a key constitutive element of a liberal political system."[68] "[T]he framers of the Citizenship Clause had no intention of establishing a universal rule of birthright citizenship."[69] "The question of the citizenship status of the native-born children of illegal aliens never arose for the simple reason that no illegal aliens existed at that time, or indeed for some time thereafter."[70] There simply were no restrictions on immigration until the late nineteenth century.[71] Before that time, "birthright citizenship could plausibly be understood as one ingredient of an integrated national strategy to encourage immigration,"[72] but "'[c]ontrol of our borders', not encouragement of immigration, now dominates contemporary policy discussions."[73] Schuck and Smith conclude that Congress has the power "to define the contours of birthright citizenship . . ."[74] "If Congress should conclude that the prospective denial of birthright citizenship to the children of illegal aliens" is good policy, then "the Constitution should not be interpreted in a way that impedes that effort." [75]

Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit is perhaps the most cited and most influential federal judge not on the Supreme Court.[76] Arguably, he is the nation's leading public intellectual. In a concurring opinion written in 2003, he argued that "Congress should rethink . . . awarding citizenship to everyone born in the United

67. SCHUCK & SMITH, *supra* note 11.

68. *Id.* at 90.

69. *Id.* at 96.

70. *Id.* at 95.

71. *See* Jonathan H. Wardle, Note, *The Strategic Use of Mexico to Restrict South American Access to the Diversity Visa Lottery*, 58 VAND. L. REV. 1963, 1966 (2005) (stating that Congress enacted virtually no immigration restrictions until 1875).

72. *Id.* at 92.

73. *Id.* at 93.

74. *Id.* at 121.

75. *Id.* at 99.

76. *See, e.g.*, Douglas G. Baird, *The Young Astronomers*, 74 U. CHI. L. REV. 1641, 1641 (2007) (stating that Richard Posner is one of "two dominant judge-scholars in the American legal tradition.").

States (with a few very minor exceptions . . .) . . . (citation omitted) including the children of illegal immigrants whose sole motive in immigrating was to confer U.S. citizenship on their as yet unborn children."[77] He quoted an article that concludes, "The situation we have today is absurd . . . For example, there is a huge and growing industry in Asia that arranges tourist visas for pregnant women so they can fly to the United States and give birth to an American."[78] "We should not," Judge Posner argued, "be encouraging foreigners to come to the United States solely to enable them to confer U.S. citizenship on their future children."[79] Citing and agreeing with Professors Schuck and Smith, he concluded that "Congress would not be flouting the Constitution if it amended the Immigration and Nationality Act to put an end to the nonsense."[80]

## IV. CONCLUSION

There have been several proposals in Congress in recent years to end birthright citizenship for children of illegal aliens by statute or constitutional amendment,[81] but none has ever come out of the House Judiciary Committee. Such a statute would probably be challenged as unconstitutional—as are most similar statutes—and the result may depend, as is usual today in controversial cases, on how Justice Anthony Kennedy votes, which is hard to predict.[82]

Constitutional restrictions on policy choices should not be favored in a democratic society. New restrictions should not be created and existing ones should not be expanded. It should not be controversial to assert—although, unfortunately, it is—that a policy choice by elected representatives should not be disallowed by judges as unconstitutional unless it clearly is—"clearly" because in a democracy the view of elected legislators should prevail over the view of judges in cases of doubt. By that

77. Oforji v. Ashcroft, 354 F.3d 609, 620–21 (7th Cir. 2003) (Posner, J., concurring opinion).

78. *Id.* (citing John McCaslin, *Inside the Beltway: Rotund Tourists*, WASH. TIMES, Aug. 27, 2002, at A7).

79. *Id.*

80. *Id.*

81. *E.g.*, *2005 Hearing*, *supra* note 7; *1995 Joint Hearing*, *supra* note 6.

82. As the swing vote on the Court, Justice Kennedy has the decisive vote on which laws go into effect.

test, a law ending birthright citizenship for a child of an illegal alien would easily survive. Indeed, its survival should require no more than recognition by the Supreme Court that the Constitution should not be interpreted to require an absurdity.

# Getting Beyond Guns: Context for the Coming Debate over Privileges or Immunities

Clark M. Neily III* & Robert J. McNamara**


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## I. ABSTRACT

The Fourteenth Amendment represents a deliberate decision by the people of this nation to make the U.S. Constitution—not state constitutions and not state officials—the primary guardian of liberty in America. The purpose of the amendment was to secure the basic civil rights of all citizens, regardless of race, and to give federal judges both the power and the duty to protect those rights from infringement by state and local governments.

Notwithstanding the misinformed claims of those who prefer a more limited role for courts in protecting constitutional rights, the history, text, and purpose of the Fourteenth Amendment are clear. And while some may find the sweep of the amendment's commands unsettling or uncongenial, that is no warrant to ignore them.

Simply put, the Fourteenth Amendment is about the right to be free—free from the oppressive, arbitrary, and self-aggrandizing abuses of authority that have plagued mankind since the advent of government itself, whether perpetrated by a monarch, a mayor, or a majority. The Fourteenth Amendment speaks broadly because the evils it addressed were broad. At the root of those evils was the illegitimate exercise of government power. At the heart of the Fourteenth Amendment lies its antidote: liberty.

The Fourteenth Amendment was enacted specifically to end a culture of lawless oppression in which the rights of newly free slaves ("freedmen") and their white supporters were trampled by state and local governments.[1] That culture featured the use of legal and extralegal authority to keep these freedmen and antislavery whites in a state of penury and terror.[2] Speech promoting equality for blacks was viciously suppressed, just as abolitionist sentiments had been before the Civil War; freedmen and even discharged Union soldiers were forcibly disarmed to make them more vulnerable to intimidation and reprisals; and economic

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1. *See infra* note 66 (describing the proposal of the Fourteenth Amendment).
2. *See infra* Part III.B.

liberties were systematically denied in order to keep the freedmen in a state of constructive servitude.[3]

Against this backdrop, the Fourteenth Amendment was meant to address three distinct evils. First, it was meant to prevent states from locking freedmen out of *political* society—an end accomplished by guaranteeing "citizenship" to anyone born within the United States.[4] Second, it was meant to prevent states from discriminating against freedmen or Union sympathizers, which it did by requiring equal protection of the laws.[5] And finally, it was meant to prevent states from locking freedmen and others out of *civil* society by stripping them of certain rights—including particularly free speech, armed self-defense, and the ability to work, contract, and hold property—that were for Reconstruction-era Americans and their forebears the very essence of liberty.[6]

This last goal was accomplished through the Fourteenth Amendment's Privileges or Immunities Clause, the avowed purpose of which was to protect substantive rights from infringement by state and local authorities.[7] If the Thirteenth Amendment was meant to make all people *legally* free, then the Fourteenth, and particularly its Privileges or Immunities Clause, was meant to make that freedom *matter.*

But the Supreme Court quickly repudiated that purpose in the *Slaughter-House Cases.*[8] Despite unambiguous evidence that Congress and the state ratifying conventions understood and intended for the Fourteenth Amendment to protect a wide range of substantive rights against state infringement, in the *Slaughter-House Cases* a five-Justice majority interpreted the Privileges or Immunities Clause as protecting only a starkly limited set of rights of "national" citizenship, including access to government subtreasuries and navigable waterways.[9] But those were obviously not the rights over which the Civil War was fought, nor were they the rights whose flagrant violation

3. *Id.*

4. *See infra* note 67 and accompanying text.

5. *See infra* note 68 (examining the states lack of enforcing early laws meant to protect freedmen).

6. *See infra* note 69 (discussing how Reconstruction Era Republicans thought about civil rights).

7. *See infra* notes 61–63 and accompanying text.

8. Slaughter-House Cases, 83 U.S. 36 (1873).

9. *Id.* at 78–79.

prompted the Fourteenth Amendment in the first place. The Privileges or Immunities Clause was very carefully, very deliberately crafted to make clear that citizens hold basic civil rights—some specifically enumerated in the Constitution and some not—that state and local governments must respect.[10] The *Slaughter-House* majority's repudiation of that design remains among the most glaring examples of judicial activism in American history.[11]

*Slaughter-House* was recognized immediately for the activist decision that it was. Nineteenth-century legal scholar Christopher Tiedeman, for example, lauded the decision for having "dared to withstand the popular will as expressed in the letter of the [Fourteenth A]mendment."[12] In his dissenting opinion, Justice Stephen Field chastised the majority for having reduced the Fourteenth Amendment, including specifically the Privileges or Immunities Clause, to "a vain and idle enactment, which accomplished nothing."[13] Modern scholars are essentially unanimous in their agreement that the *Slaughter-House* majority's interpretation of the Privileges or Immunities Clause is intellectually indefensible.[14]

Over time and in the face of subsequent outrages like Jim Crow, the notion that state and local governments would be the chief protectors—rather than the chief violators—of civil rights became increasingly untenable.[15] Again, the driving force behind those outrages was southern states' attempt to keep blacks in what amounted to a state of servitude, the Civil War notwithstanding.[16] Of course, the most basic way to do that was to give whites unfettered power over freedmen's

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10. *See infra* Part III.C.

11. *Slaughter-House*, 83 U.S. at 77.

12. David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 MO. L. REV. 93, 121 (1990) (quoting CHRISTOPHER G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW 102–03 (1890)).

13. *Slaughter-House*, 83 U.S. at 96 (Field, J., dissenting).

14. *E.g.*, Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 627 (1994).

15. *See generally* Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 RUTGERS L. REV. 309, 347 (2003) (citing William Cohen, Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis, 42 J.S. Hist. 31, 55–57 (1976) (discussing the purpose and effects of Jim Crow).

16. *Id.*

livelihoods, which is precisely what the Black Codes did.[17] And it was but a small step from there to marginalizing other "out" groups, such as women and immigrants, whose attempts, along with emancipated blacks, to enter the labor market in the late Nineteenth century produced intense competitive pressures and a predictable backlash from entrenched interests.[18]

Having incorrectly held that the Privileges or Immunities Clause did not protect a citizen's right to earn an honest living and then faced with increasingly blatant legislative abuses, the Supreme Court occasionally protected that right through the doctrines of equal protection and substantive due process in cases such as *Yick Wo v. Hopkins* and *Lochner v. New York.*[19] Even some state courts recognized the importance of occupational freedom and its particular vulnerability to interest group politics. As the Michigan Supreme Court observed in 1889:

> It is quite common in these later days for certain classes of citizens . . . to appeal to the government—national, state, or municipal—to aid them by legislation against another class of citizens engaged in the same business, but in some other way. This class legislation, when indulged in, seldom benefits the general public, but nearly always aids the few for whose benefit it is enacted . . . . This kind of legislation should receive no encouragement at the hands of the courts . . . .[20]

However, the era of judicial concern for occupational freedom was swept away in the New Deal revolution that ushered in another breathtaking era of activism in which the clear commands of the Constitution—a federal government

17. *Id.*

18. *See generally* Bina Kalola, *Immigration Laws and the Immigrant Woman: 1885–1924*, 11 GEO. IMMIGR. L.J. 553, 566–67 (1997) (discussing the effect of severely low wages on immigrant women in the late nineteenth century and early twentieth century).

19. Lochner v. New York, 198 U.S. 45, 53–54 (1905) (holding that New York's regulation of the working hours of bakers was not a justifiable restriction of the right to contract freely under the Due Process Clause of the Fourteenth Amendment); Yick Wo v. Hopkins, 118 U.S. 356, 369–71 (1886) (holding that a law which is race neutral on its face but as applied is discriminatory against Chinese laundry business owners is a violation of the Equal Protection Clause).

20. Chaddock v. Day, 42 N.W. 977, 978 (Mich. 1889).

of limited powers and state respect for the obligations of contracts, for example—were ignored in favor of politically popular, but plainly illegal, economic policies.

Historically, in many cases the Supreme Court has shown a tendency to construe power-granting provisions of the Constitution quite broadly[21] and power-constraining provisions more narrowly.[22] From the standpoint of the Framers and originalism, this gets it exactly backwards.[23] Revisiting *Slaughter-House* in order to finally engage the Privileges or Immunities Clause would be an important step towards correcting that imbalance, and the Court now has a perfect vehicle to undertake that effort: post-*Heller* gun litigation.[24]

In *District of Columbia v. Heller*, the Supreme Court held for the first time that the Second Amendment protects an individual's right to keep and bear arms.[25] But because Washington, D.C., is a federal enclave, the decision left open the question whether the federal Constitution protects the right to keep and bear arms against infringement by state and local governments as well.[26] Given the history of the Fourteenth Amendment,[27] there can be no doubt that it does. The key question is how—through the Privileges or Immunities Clause, as the Framers and ratifiers of the Fourteenth Amendment intended, or through substantive due process, a doctrine Supreme Court seized on in an attempt ameliorate its mistake in *Slaughter-House*?[28]

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21. *See, e.g.*, McCulloch v. Maryland, 17 U.S. 316, 422–25 (1819) (interpreting the Necessary and Proper Clause to hold that Congress has the power to incorporate a national bank nothwithstanding the lack of a constitutionally enumerated power to do so).

22. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES § 3.3.2 (3rd ed. 2006) (citing Gibbons v. Ogden, 22 U.S. 1, 196–97 (1824) (holding that the Tenth Amendment did not restrict Congress's power to regulate commerce)).

23. *See generally* Steven D. Smith, *The Writing of the Constitution and the Writing on the Wall*, 19 HARV. J.L. & PUB. POL'Y 391, 394–95 (Winter 1996) (discussing the Framer's choice to use the enumerated powers doctrine "both for creating and for limiting governmental power").

24. District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

25. *Heller*, 128 S. Ct. at 2799.

26. *Infra* note 162.

27. *See infra* Part III.C (discussing the context and framing of the Fourteenth Amendment).

28. *See generally infra* note 143 (explaining Substantive Due Process' relationship to *Slaughter-House*).

The Supreme Court effectively wrote the Privileges or Immunities Clause out of the Constitution in 1873. The time has come to put it back.

## II. INTRODUCTION

As it struggled to cope with the aftermath of the Civil War and to dismantle the system of human slavery that had both dominated and disgraced its early history, the United States adopted a trio of amendments designed to fulfill the promise of America as originally expressed in our founding documents, the Constitution and the Declaration of Independence.[29] These Reconstruction Amendments were specifically intended to reshape the relationship between government—federal, state, and local—and the people.[30] While an immediate goal of the amendments was to confer full and equal citizenship on the freedmen, they also had a deeper, more profound purpose: to stamp out a culture of lawlessness and oppression that had grown up around the issue of slavery and the attempts to abolish it. This culture had grown like a cancer until it menaced the freedom of all citizens and the very notion of liberty upon which this country was founded.[31]

While the Reconstruction Amendments were a tremendous victory, they were not a final victory. The same debates over the scope of state power and states' relationships to the federal government that had raged before Reconstruction continued after the Amendments' ratification.[32] In some cases, such as the Thirteenth Amendment's ban on slavery, the Reconstruction Republicans' goals were met with unqualified success.[33] In other cases, success was grossly delayed: the Supreme Court, for example, found that the

29. *See* U.S. CONST. amend. XIII, § 1 (prohibiting slavery and involuntary servitude); U.S. CONST. amend. XIV, §1 (guaranteeing equal protection of the laws); U.S. CONST. amend. XV, §1 (prohibiting states from denying the right to vote "on account of race, color, or previous condition of servitude").

30. DONALD P. KOMMERS ET AL., AMERICAN LAW: ESSAYS, CASES, AND COMPARATIVE NOTES 436 (Rowman & Littlefield 2d ed. 2004).

31. W.E.B DUBOIS, BLACK RECONSTRUCTION IN AMERICA 1860–1880 at 674 (THE FREE PRESS 1998) (1935).

32. NIGEL BOWELS, THE GOVERNMENT AND POLITICS OF THE UNITED STATES 170 (St. Martin's Press, Inc. 2d ed. 1993).

33. SUSAN-MARY GRANT & PETER J. PARISH, LEGACY OF DISUNION: THE ENDURING SIGNIFICANCE OF THE AMERICAN CIVIL WAR 92 (Louisiana State University Press 2003).

Equal Protection Clause of the Fourteenth Amendment presented no obstacle to legal segregation.[34] This misreading of the Amendment allowed a system of de jure segregation to persist for decades until the Supreme Court's error was corrected in 1954.[35]

In still other cases, though, the Reconstruction Amendments' purposes were stymied. The Fourteenth Amendment's Privileges or Immunities Clause, meant to stand as a bulwark against state interference with individual liberties, was almost immediately gutted by the Supreme Court;[36] but unlike equal protection, the Privileges or Immunities Clause is *still* waiting for its *Brown v. Board* to correct the Supreme Court's activism in *Slaughter-House.*[37]

Notwithstanding the imprecision with which it is frequently used, the term "judicial activism" does have a fixed meaning, namely, the substitution by a judge of his or her personal preferences for law.[38] That is precisely what happened in the *Slaughter-House Cases,* where a bare majority essentially announced that it considered unwise the Nation's decision to empower the federal government to enforce basic civil rights and would refuse to apply the Amendment insofar as it did so.[39] That display of activism has deprived Americans of a properly engaged federal judiciary for more than a century.

This paper tells the story of the Privileges or Immunities Clause—its original purpose, its redaction by the Supreme Court, and its prospects for revival. The Supreme Court would do well to prepare for the challenges of the twenty-first century by correcting a particularly glaring mistake from the nineteenth. Properly understood, the Privileges or Immunities Clause speaks to a wide range of modern concerns—from gun control to property rights to occupational freedom—and provides a coherent framework

34. *E.g.*, Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

35. *E.g.*, Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954).

36. Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart,* 106 MICH. L. REV. 1517, 1532 (2008) (citing *Slaughter-House,* 83 U.S. 36).

37. *Brown,* 347 U.S. 483; *Slaughter-House,* 83 U.S. 36.

38. *See* Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism,* 91 MINN. L. REV. 1752, 1765–66 (2007).

39. *Slaughter-House,* 83 U.S. at 78. ("[T]he privileges and immunities relied on . . . are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and *not by this article placed under the special care of the Federal government . . .*") (emphasis added).

for engaging those issues that is based on the text and history of the Constitution.

## III. SLAVERY, ABOLITION, AND THE SHIFTING BALANCE OF POWER BETWEEN THE FEDS, THE STATES, AND THE PEOPLE.

The Fourteenth Amendment represented a capstone—not just of the Civil War, but of a decades-long political struggle that sought to redeem the spirit of liberty from the crucible of slavery and its incidents. The Amendment can be neither understood nor interpreted without a proper appreciation of the historical dynamics that produced it, particularly the specific evils the Amendment was designed to cure.

A proper understanding of the meaning of the Privileges or Immunities Clause has three basic components. First is the context in which the debates over the Fourteenth Amendment took place—the continuing struggle, dating back to the framing of the Constitution, over the relationship between the federal government, the states, and the people, who understood themselves to be *sovereign*.[40] Second, one must understand what abolitionists and congressional Republicans were trying to accomplish, that is, the specific issues that gave rise to the Fourteenth Amendment. Finally, one must look at what they actually produced—the Amendment's text and how it was crafted.

### A. *Pre-Civil War Debates*

The U.S. Constitution was adopted as a significant change in its own right—a change meant to centralize more power in the federal government after the failure of the feeble authority created by the Articles of Confederation.[41]

In striking a new balance between federal power and state power, one question loomed large: slavery.[42] In the original Constitution, the Framers largely punted on this question—while there were some implicit references to slavery, such as

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40. U.S. CONST. pmbl.; U.S. CONST. art. I, § 2, cl. 1.

41. *See* THE FEDERALIST NO. 11 (Alexander Hamilton) (describing the need for greater unity in the new government).

42. *See* LARRY SCHWEIKART & MICHAEL ALLEN, A PATRIOT'S HISTORY OF THE UNITED STATES 114–16, Penguin Group 2007 (2004) (stating that disagreements between the Framers over slavery were an "even more important . . . difference" than arguments over counting representatives.).

the notorious "three-fifths compromise" of Article I, sec. 2, the terms "slave," "slavery," "human bondage" and the like do not appear anywhere in the document.[43]

The issue of slavery arose again when the first Congress introduced the proposed amendments that became the Bill of Rights. James Madison's initial draft amendments included provisions that would clearly protect individual rights from infringement by the states—but those provisions were stripped from the final version.[44] As was the case throughout the framing of the Constitution, any provisions that might have threatened the institution of slavery were scrupulously avoided.[45]

The Framers' failure to address slavery or to delineate the balance of power between the federal and state governments on that issue created a void in the Constitution with far-reaching implications. While everyone recognized that the new Constitution had created a stronger central government, there was much uncertainty about just how strong that government would be and the precise bounds of its power vis-à-vis the states and the people.[46] One school of thought held that state governments retained the power to nullify federal laws they did not like.[47] Another, in part motivated by the Constitution's failure to grapple with the slavery problem, held that the Constitution itself was illegitimate.[48]

A third school of thought—of particular importance because it became the dominant view among many of the Reconstruction Republicans who would control Congress and propose the Fourteenth Amendment—held that the Constitution as drafted imposed substantive limitations on

43. Roy L. Brooks, *Ancient Slavery Versus American Slavery: A Distinction With a Difference*, 33 U. MEM. L. REV. 265, 270 (2003) ("The words slave and slavery . . . do not appear in the [Constitution]; euphemistic terminology is used in the sections dealing with slavery.").

44. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 22 (Yale University Press 1998).

45. MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 19 (Duke University Press 1986).

46. U.S. CONST. amend. X.

47. *E.g.*, John C. Calhoun, *Speech on the Force Bill* (1833), *in* UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 401, 428–29 (Ross M. Lence ed., Liberty Fund 1992).

48. *See* Lysander Spooner, *No Treason, No. VI: The Constitution of No Authority* (1870), *in* THE COLLECTED WORKS OF LYSANDER SPOONER (Charles Shively ed., 1971).

the states.[49] While this is a surprising and certainly difficult argument to accept through modern eyes—particularly given Madison's unsuccessful amendments—there can be no doubt that it was sincerely held at the time.[50] Though mistaken, the view that the Bill of Rights applied directly to the states was apparently fairly common,[51] while a more sophisticated view held that Article IV's Privileges *and* Immunities Clause protected substantive rights from state incursion.[52]

However sincerely held, those views had already been rejected by the Supreme Court. In *Barron v. Baltimore*, the Court held that the Constitution posed no barrier to a city's appropriation of private property because the Fifth Amendment's takings provision (along with the rest of the Bill of Rights) had no application to the states.[53] Further, in *Dred Scott*, the Court adopted a narrow reading of Article IV's Privileges and Immunities Clause, finding that it only restrained states' ability to treat temporary visitors differently from residents, but imposed no requirements on what rights the states denied to different classes of citizens.[54]

But those precedents did not discourage antislavery advocates from believing in, and clamoring for their rights-protecting vision of the Constitution. Contemporary antislavery legal theorists, such as Joel Tiffany, continued to insist, notwithstanding the court decisions in opposition, that the Constitution provided a meaningful check on state actions.[55] In his 1849 *Treatise on the Unconstitutionality of Slavery*, Tiffany made an impassioned defense of his vision of the Constitution that would protect "all the rights privileges, and immunities, granted by the Constitution of the United States" from encroachment by state governments by "the force of the whole Union."[56] This protection flowed from

49. *See* CURTIS, *supra* note 45, at 43–56.

50. *Id.* at 54.

51. The seemingly frustrated Bingham attempted to persuade some of his recalcitrant colleagues that "the power of the Federal Government to enforce in the United States courts the bill of rights . . . had been denied." CONG. GLOBE, 39th Cong., 1st Sess. 1089–90 (1866).

52. CURTIS, *supra* note 45, at 47–48.

53. Barron v. Baltimore, 32 U.S. 243, 248 (1833).

54. Dred Scott v. Sanford, 60 U.S. 393, 422–23 (1856).

55. CURTIS, *supra* note 45, at 42–43.

56. JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 56 (1849).

one's national citizenship for, on Tiffany's reading, being a citizen of the United States was to be "*invested* with a *title to life, liberty,* and the *pursuit of happiness,*" with United States citizenship providing "a panoply of defense equal, at least, to the ancient cry '*I am a Roman citizen*'" standing as a barrier to oppression by *any* government, including that of a state.[57]

It is worth noting that while Tiffany's theory of the scope of constitutional protection was a minority view, his use of the term "privileges" to describe substantive rights like freedom of speech was not unusual.[58] As Michael Kent Curtis notes, this usage "had a long and distinguished heritage," appearing in Blackstone's landmark *Commentaries on the Laws of England* even prior to the American Revolution.[59] Even the reviled *Dred Scott* decision referred to the Bill of Rights as the "rights and *privileges* of the citizen."[60]

The view of many antislavery advocates that the Bill of Rights should be understood as binding state governments may have been wrong—that is, the *Barron* court may have been entirely correct in its interpretation of the Constitution—but it profoundly influenced later debates over the scope and significance of the Fourteenth Amendment nevertheless. As Yale professor Akhil Reed Amar notes, the very phrase "Bill of Rights" became commensurate with the view that the first ten amendments to the Constitution were binding on the states—because, as declarations of *rights* (meaning *natural rights*), they could necessarily be asserted against any government.[61]

New York Republican John Bingham also shared the Republican understanding of Article IV's Privileges and Immunities Clause: that it protected substantive rights against state infringement, not simply discrimination against nonresidents. In 1859, speaking out against the provisions in the proposed Oregon state constitution that would forbid free blacks from entering the new state, Bingham disputed the validity (or perhaps legitimacy) of both *Dred Scott* and

57. *Id.*

58. AMAR, supra note 44, at 166–69.

59. CURTIS, *supra* note 45, at 64.

60. Dred Scott v. Sanford, 60 U.S. 393, 449 (1856) (emphasis added).

61. AMAR, *supra* note 44, at 286–87 (noting that the phrase "Bill of Rights" hardly ever appeared in antebellum congressional debates, and was the exclusive domain of Republicans in the debates over the Fourteenth Amendment).

*Barron*, arguing that free blacks were citizens of the United States and therefore held substantive rights protected by Article IV. His explanation of the Clause gives tremendous insight into the language that eventually made its way into the Fourteenth Amendment:

> The citizens of each State, all the citizens of each State, being citizens of the United States, shall be entitled to "all privileges and immunities of citizens in the several States." Not to the rights and immunities of the several States; not to those constitutional rights and immunities which result exclusively from State authority or State legislation but to "all privileges and immunities" of citizens of the United States in the several States. There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is "the privileges and immunities of citizens of the United States in the several States" that it guaranties.[62]

These are not simply the views of an ordinary Republican Congressman. While Bingham was active in the pre-Civil War debates over the constitutional relationship between the states and the federal government, he truly found fame several years later as the chief architect of the Fourteenth Amendment. Bingham then took the opportunity to correct the perceived "ellipsis" in Article IV's Privileges and Immunities Clause by "filling in" the missing text in the Fourteenth Amendment's Privileges *or* Immunities Clause.[63]

### B. *The Abuse, Redemption, and Surrender of Civil Rights in the Reconstruction Era South.*

As with any constitutional provision, the interpretation of the Fourteenth Amendment should be guided by a clear understanding of the specific evils the provision was meant to address.[64] In the case of the Fourteenth Amendment, the "mischief" that concerned Congress is easy to identify: state

62. CONG. GLOBE, 35th Cong., 2d Sess., 984 (1859).

63. See *infra* Part III.C and notes 83–86.

64. *Cf.* Rhode Island v. Massachusetts, 37 U.S. 657, 723 (1838) ("In the construction of the constitution we must . . . examine the state of things existing when it was framed and adopted to ascertain the old law, the mischief and the remedy.").

and local authorities throughout the South were systematically violating individual rights of emancipated blacks and their white supporters in open defiance of federal demands for full and equal citizenship for all.[65] In 1866, Reconstruction Republicans undertook to set things straight.[66]

The Fourteenth Amendment struck at three distinct "evils." First, it was meant to prevent the states from locking newly freed slaves out of *political* society—an end accomplished by incorporating the Republican view that all people born within the United States were citizens of the United States, effectively overruling the *Dred Scott* decision.[67] Second, the Fourteenth Amendment was meant to prevent states from discriminating against newly freed slaves, for example, by refusing to provide black citizens with police protection—a problem addressed by the requirement that no state shall deny any person within its jurisdiction the equal protection of the laws.[68] Third, it was meant to prevent states from locking freedmen and others out of *civil* society by stripping them of certain rights—like the rights to speak freely, to defend themselves, and to earn a livelihood in the field and on the terms of their choosing—that Reconstruction Republicans (and presumably most Americans) viewed as inherent in the definition of what it meant to be free.[69]

Republican concern for violations of civil liberties and natural rights did not start with the Reconstruction Congress.[70] Indeed, the heated atmosphere of pre-Civil War

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65. *See* Paul Finkelmen, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 680–90 (2003) (discussing John Bingham's response to the racial climate in the South before the Fourteenth Amendment's passage).

66. CONG GLOBE, 39th Cong., 1st Sess. 3148-49 (1866) (describing the proposal of the Fourteenth Amendment).

67. The integration of freedmen into *political* society was, of course, not complete until the introduction of the Fifteenth Amendment two years after the introduction of the Fourteenth Amendment. *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 579–81 (1978).

68. *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888 at 349 (University of Chicago Press 1985) (describing how laws meant for the protection of blacks were not being enforced).

69. *Cf.* Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1, 25–26 (1998) (describing Reconstruction Era Republican thought about protecting rights of both blacks and whites).

70. *See, e.g.*, State v. Worth, 52 N.C. 488, 492 (1860) (involving an abolitionist Republican campaign document); CLEMENT EATON, FREEDOM OF THOUGHT IN THE OLD

debates over slavery and abolition effectively fused opposition to slavery with staunch support for civil liberties, as Southern states made clear that no individual right was sacred when it came to propping up the 'peculiar institution.'[71] In North Carolina, for example, an abolitionist named Daniel Worth was indicted and sentenced to twelve months in prison in 1858 for circulating *The Impending Crisis of the South* by Hinton Rowan Helper of North Carolina, an antislavery tract that doubled as a Republican campaign document.[72] In Virginia, the act of outsiders "adovocat[ing] or advis[ing] the abolition of slavery" was criminalized.[73] And, of course, the abuse of individual rights did not stop with the end of the Civil War or with the adoption of the Thirteenth Amendment.[74] To the contrary, legislative testimony and newspaper accounts provide compelling evidence concerning the scope and intensity of the assault on civil liberties during Reconstruction.[75]

The stories are legion. Discharged Union soldiers were forcibly stripped of their weapons; South Carolina law prescribed flogging for any black man who broke a labor contract; other laws prevented blacks from practicing trades or even leaving their employer's land without permission; minors in Mississippi were "taken from their parents and bound out to the planters"; white Union sympathizers often had their property seized or found themselves banished from a state outright.[76] In one Kentucky town, it was reported that the "marshall [took] all arms from returned colored soldiers and [was] very prompt in shooting the blacks whenever an opportunity occur[red]," while outlaws made "brutal attacks and raids upon the freedmen, who [were] defenseless, for the civil law-offices disarm the colored man and hand him over to

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SOUTH 245 (Duke University Press 1940) (detailing an indictment in Virginia for distribution of the same book).

71. *Id.*

72. *Id.*

73. EATON, *supra* note 70, at 127.

74. STEPHEN HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–76 at 1–5 (Praeger Publishers 1998).

75. *See, e.g.*, David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866–68*, 30 WHITTIER L. REV. 695, 703–07 (listing newspaper articles that describe Reconstruction Era assaults on civil liberties).

76. *Id.*

armed marauders."[77] These acts were widely reported, fostering outrage not just in Congress, but throughout the popular press.[78] For many, if not most freedmen, being "free" could not have seemed much better than life as a slave.[79]

While it may be tempting to see these outrages as an ugly but isolated moment in our nation's history, they are not. To the contrary, in America as everywhere else, those with power have always abused it, and the simple freedom to go about one's business unmolested and enjoy the fruits of one's labor is perpetually insecure. The Fourteenth Amendment, referred to by Justice Swayne in his *Slaughter-House* dissent as part of America's "new Magna Carta,"[80] was a deliberate attempt to secure that freedom.

### C. *Framing the Fourteenth Amendment*

Congress in 1866 was considering several concurrent measures to address the twin problems of Reconstruction and the re-admittance of Southern states to the Union.[81] Those measures included the bill that became the Civil Rights Act of 1866 and the various drafts of what would eventually become the Fourteenth Amendment.[82] Given the overlapping character of and motivations behind these measures, the debates over them can generally be treated as a single coherent conversation over the central question of how to secure individual rights in the former Confederacy.

The Fourteenth Amendment was largely drafted and guided by John Bingham, a New York congressman and moderate Republican whom the "*New York Times* described as 'one of the most learned and talented members of the House.'"[83] Bingham's leadership is important for several

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77. H.R. REP. No. 30, at 32 (1866).

78. Halbrook, *supra* note 74, at 7, 19, 31, 37.

79. *Cf.* Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the* Slaughter-House Cases *without Exhuming* Lochner*: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 72 (1996) (noting the Reconstruction South's additional abuse of the right to "free speech, the right to hold religious meetings[,] and the right to bear arms").

80. *Slaughter-House*, 83 U.S. at 125 (Swayne, J., dissenting).

81. *Cf.* WILLIAM H. BARNES, HISTORY OF THE THIRTY-NINTH CONGRESS OF THE UNITED STATES 33–34 (Harper and Brothers Publishers 1868) (discussing Congressional focus on secessionist states in 1866).

82. CURTIS, *supra* note 45, at 57–58.

83. *Id.* at 58.

reasons, not least of which because his views explain why the debates over the Civil Rights Act are every bit as relevant to the proper interpretation of the Fourteenth Amendment as are the debates over the Amendment itself. Many Congressional Republicans, given their unorthodox theory of the Constitution, believed (mistakenly) that the federal government already had all the power it needed to protect rights in the states.[84] But Bingham understood that was not so, and he also recognized that without some sort of enabling amendment to the Constitution, the Supreme Court might well invalidate the Civil Rights Act as well.[85]

While many members of Congress appeared unaware (or unwilling to acknowledge) that the Supreme Court had long ago rejected their theory of constitutional interpretation, Bingham was all too aware of these decisions, and deliberately framed the Fourteenth Amendment as a response to *Barron*.[86] As he explained several years after the adoption of the Amendment:

> I noted and apprehended . . . certain words in that opinion of Marshall. Referring to the first eight articles of amendments to the Constitution of the United States, the Chief Justice said: "Had the framers of these amendments intended them to be limitations on the powers of the State [sic] governments they would have imitated the framers of the original Constitution and have expressed that intention." Barron *vs.* The Mayor, &c., Peters, 250.
>
> Acting upon this suggestion I did imitate the Framers of the original Constitution. As they had said "no State shall emit bills of credit [etc.] . . . imitating their example and imitating it to the letter, I prepared

84. For example, Senator Richard Yates from Illinois presumably spoke for many of his colleagues when he expressed surprise (perhaps feigned) that the question of federal power to protect individuals from state governments was even being debated: "I had," he said, "in the simplicity of my heart, supposed that 'State rights,' being the issue of the war, had been decided." CONG. GLOBE, 39th Cong., 1st Session 99 appendix (1866).

85. *See* CURTIS, *supra* note 45, at 80–81.

86. *See* notes 62–63 and accompanying text.

> the provision of the first section of the fourteenth amendment as it stands in the Constitution . . . .[87]

Debates over what became the Fourteenth Amendment are replete with the natural-rights language that Republicans had used for decades in arguing against slavery.[88] Having been unable to respond effectively to state predations against natural rights before the Civil War, Reconstruction Republicans were intent on remedying what they considered a flawed constitutional rule that rendered the federal government powerless to stop those abuses as they continued after the war.

Throughout the 1866 debates, congressmen drew clear distinctions between their concern about *equality*—a concern that state laws be even-handed—and their concern about protections of *substantive rights*.[89] Representative Thayer, for example, praised the Fourteenth Amendment as "so necessary for the equal administration of the law" *and* as "so necessary for the protection of the fundamental rights of citizenship."[90]

That distinction is essential to a proper understanding of the Privileges or Immunities Clause.[91] After all, as Michael Kent Curtis has observed, "[I]n the South, the ideal solution to the problem of speech about slavery was compelled silence"—fully and equally applicable to blacks and whites.[92] Thus, far from being concerned only with equality, congressional Republicans wanted to prevent states from violating "guarantied [sic] privileges" like the right to speak out against slavery or cruel or unusual punishment,[93] and to reaffirm and protect certain "inalienable rights, pertaining to

87. AMAR *supra* note 44, at 164–65 (quoting CONG. GLOBE, 42nd Cong., 1st Sess. 84 app. (1871) (emphasis altered)).

88. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866) (statement of Rep. Frederick Woodbridge) (stating that the proposal would give the federal government the power to "give to a citizen of the United States the natural rights which necessarily pertain to citizenship").

89. CONG. GLOBE, 39th Cong., 1st Sess. 2465 (1866).

90. *Id.*

91. Some academics have argued that the Clause was meant only to require *equality* of rights, rather than to protect individual rights from infringement. *E.g.*, John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L. J. 1385, 1392–93 (1992).

92. CURTIS, *supra* note 45, at 47.

93. CONG GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham).

every citizen, which cannot be abolished or abridged by State constitutions or laws."[94]

It was also very much the Framers' intent to ensure that *federal courts* would actively restrain state action. Representative Bingham discussed at length the Supreme Court's decision in *Barron*, citing it as evidence that "the power of the Federal Government to enforce in the *United States* courts the bill of rights under the articles of amendment to the Constitution had been denied."[95] Bingham's position was hotly disputed by Robert Hale, who insisted that the Bill of Rights already restrained state legislation but who acknowledged, in response to Bingham's challenge to name any court decision protecting liberty from state encroachment under the Bill of Rights, that he had "somehow or other" gotten that idea but could not identify any cases supporting it.[96]

The intended meaning of the Privileges or Immunities Clause was perhaps most succinctly summarized by Representative Bingham himself:

> There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply . . . . It is the power . . . to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.[97]

These sentiments were echoed in the Senate. In introducing the Amendment, Senator Jacob Howard relied extensively on Justice Bushrod Washington's opinion in *Corfield v. Coryell*, to illustrate the natural rights or "fundamental guarantees" that were encompassed in the term "privileges and immunities."[98] Senator Howard was as clear

94. *Id.* at 1832 (statement of Rep. Lawrence); *See also* CURTIS, *supra* note 45, at 44–65 (describing and debunking what Curtis calls the "equality only" view of the Privileges or Immunities Clause).

95. CONG. GLOBE, 39th Cong., 1st Sess. 1089–90 (1866) (emphasis added).

96. *Id.* at 1066.

97. *Id.* at 2542.

98. *Id.* at 2765.

about the source of protection for these rights as he was about the rights themselves: "That is [the Amendment's] first clause," he said, "and I regard it as very important."[99] Senator Howard's sentiments, including his explicit invocation of *Corfield*, were repeated by others throughout the debates.[100]

This understanding of privileges or immunities was equally pervasive in the debates over the Amendment's ratification. Historian Michael Kent Curtis quotes Congressman Columbus Delano during the Ohio ratification debates:

> I know very well that the citizens of the South and of the North going South have not hitherto been safe in the South, for want of constitutional power in Congress to protect them. I know that white men have for a series of years been driven out of the South, when their opinions did not concur with the chivalry of Southern slaveholders . . . . We are determined that these privileges and immunities of citizenship by this amendment of the Constitution ought to be protected.[101]

Delano's views are consistent with those expressed in newspaper articles and editorials concerning the Fourteenth Amendment's ratification.[102] David Hardy, for example, quotes a lengthy pseudonymous essay in the *New York Times* (credited only to "Madison"), which argued the "rights and privileges of a citizen of the United States . . . [including] the rights to possess and acquire property of every kind, and to pursue . . . happiness and safety . . . are the long-defined rights of a citizen of the United States, with which States cannot constitutionally interfere."[103] Even those who opposed the amendment did so precisely because they believed it would allow for federal protection of individual rights.[104]

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99. *Id.*

100. BERNARD SIEGAN, THE SUPREME COURT'S CONSTITUTION 55–65 (Transaction Books 1987).

101. CURTIS, *supra* note 45, at 138–39.

102. *See* Hardy, *supra* note 75 at 710–18 (listing Reconstruction Era articles about civil liberties violations).

103. *Id.* at 718 (quoting "Madison," *The National Question: The Constitutional Amendments—National Citizenship*, The New York Times, Nov. 10, 1866, at 2, col. 2–3).

104. *Id.* at 23.

Legal scholars took the same view.[105] Three significant legal treatises were published between the proposal of the Fourteenth Amendment and its ratification, each of which took the position that the Privileges or Immunities Clause would protect the substantive rights of American citizens.[106]

In short, the congressional leadership intended to bring the Constitution in line with longstanding Republican ideology about national citizenship and natural rights, and to protect those rights from further violation at the hands of state and local officials.[107] And the public appears by all accounts to have understood the proposed Fourteenth Amendment that way as well—if there is a credible historical counter-narrative, it has yet to be offered. Thus, the notion that we lack the means to properly understand the Privileges or Immunities Clause of the Fourteenth Amendment is a fiction, and a rather shabby one at that.

## IV. THE BRIEF ROAD TO EVISCERATION BY THE SUPREME COURT

The initial battles over the Privileges or Immunities Clause—during its drafting and ratification—were clear victories for proponents of federal protection for natural rights. But just five years later, that vision was dealt a shocking blow by a narrow majority of the Supreme Court determined to substitute its preference for what we today would call minimalism for the expressed will of the people.[108]

That blow, of course, was delivered by the Court in the infamous *Slaughter-House Cases*.[109] At issue in *Slaughter-House* was the constitutionality of a Louisiana law granting an exclusive monopoly on the right to sell and slaughter animals in New Orleans to a single politically connected company.[110] Local butchers could continue to practice their trade under the law, but they could do so only in facilities operated by, and upon payment to, the government-favored monopolist.[111]

105. Richard Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L.J. 57, 83–94 (1993).

106. *Id.* at 83.

107. *Id.* at 83-94.

108. *See Slaughter-House*, 83 U.S. 36.

109. *Id.*

110. *Id.* at 59–60.

111. *Id.* at 61, 63.

Plainly, this was not an ideal test case for outlining the bounds of the Fourteenth Amendment. For one thing, as the Louisiana Supreme Court made clear in initially upholding the law, the state was responding to a legitimate public health concern. There is a long and understandable history of cities restricting the slaughter of animals for sanitary reasons, and in New Orleans, the lack of regulation had resulted in pestilent waste being dumped in the river and even occasional stampedes, as cattle would "break[] loose and rush[] wildly and madly through the streets, endangering the limbs and the lives of men, women, and children."[112] While the government's response to those health concerns—creating a single monopolist rather than restricting the areas in which animals could be slaughtered or imposing waste-disposal regulations—was surely objectionable, it is difficult to dispute the evidence of a genuine problem with the preexisting laws governing slaughterhouses.

To the butchers, though, the creation of a state-sanctioned monopoly seemed an obvious violation of the Privileges or Immunities Clause, which they understood as protecting their right to earn a living free from unreasonable—obviously including corrupt—government interference.[113] Just as the Black Codes had bound freedmen to an employer's land, imposed onerous contractual terms on their labor, and even barred them from participating in particular trades,[114] the butchers viewed this challenged law as a direct affront to their livelihoods.[115] The Supreme Court disagreed with that premise as a factual matter; as Justice Miller explained, "a critical examination of the act hardly justifies [the butcher's] assertions."[116] But instead of stopping there, the majority went on to construe the Privileges or Immunities Clause as an essentially meaningless provision.[117]

In Justice Miller's opinion for the 5–4 majority, the Court posits a dichotomy of rights—those that are held by virtue of one's state citizenship on the one hand, and those that are

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112. *Id.* at 62; State *ex rel.* Belden v. Fagan, 22 La. Ann. 545, 551–52 (La. 1870).

113. *Slaughter-House*, 83 U.S. at 60, 66.

114. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877 200–04 (Henry Steele Commager & Richard B. Morris eds., Harper & Row 1988).

115. *Slaughter-House Cases*, 83 U.S. at 60–66.

116. *Id.* at 60.

117. *Id.* at 77.

held by virtue of one's national citizenship on the other.[118] The rather obvious purpose of this is to disclaim any responsibility—or even authority—on the part of the federal government to protect precisely those rights whose wanton violation by state governments was the driving force behind the enactment of the Fourteenth Amendment generally and the Privileges or Immunities Clause in particular.[119]

The tenor of the opinion is striking, as it makes clear that its crabbed interpretation rests on a basic disapproval of the amendment's purpose; that is, the Court effectively read the Privileges or Immunities Clause out of the Constitution because the "consequences" of reading the Clause properly would be "so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions."[120] The opinion's hostility to the Reconstruction Congress and its aims is barely masked as Justice Miller only briefly notes the exploitative economic restrictions imposed on freedmen before suggesting that the congressional hearings were tainted with "falsehood or misconception ... [in] their presentation."[121]

Rather than read the Privileges or Immunities Clause to work a significant change in the constitutional order—which it was explicitly intended and understood to have done by those who drafted and ratified it—the Court viewed the Clause as protecting only a narrow set of rights of "national citizenship," including "the right to use the navigable waters of the United States" and "the right of free access to ... the subtreasuries, land offices, and courts of justice in the several States."[122] While some modern advocates have attempted to rehabilitate *Slaughter-House*, arguing that Justice Miller's opinion does not foreclose reading the Privileges or Immunities Clause to protect certain additional rights,[123] the

118. *Id.* at 74–82.

119. *See supra* text accompanying note 46–47.

120. *Slaughter-House*, 83 U.S. at 77–78.

121. *Id.* at 70.

122. *Id.* at 79.

123. Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1100–01 (2000) (arguing that Justice Miller's opinion did not necessarily reject incorporation and gut the Fourteenth Amendment since the total incorporation via the Privileges or Immunities Clause may have been a minimum view accepted by all the Justices).

opinion itself is clear on this point: it draws a distinction between rights whose very existence depends on the federal government—like access to its subtreasuries—and rights that had hitherto been the responsibility of the states, making clear that the latter were "not intended to have any additional protection by this paragraph of the amendment."[124] In short, *Slaughter-House* rendered the Privileges or Immunities Clause an essentially dead letter though of course the possibility remained that it might one day be pressed into service by someone who is seeking access to a seaport or navigable waterway.[125]

Justice Stephen Field wrote a powerful dissent in which he chided the majority for rendering the Privileges or Immunities Clause "a vain and idle enactment, which accomplished nothing."[126] Field acknowledged the state's interest in public health, but unlike the majority, recognized that there was a difference between the proper exercise of the state's police power to control where and how animals were slaughtered and the grant of an exclusive monopoly to one corporation. Noting that the law contained provisions prohibiting slaughtering animals in certain areas and requiring inspection of all animals to be slaughtered, Justice Field correctly observed that there was no *additional* public-health concern that would justify the creation of the slaughter-house monopoly.[127]

Having dispensed with the portions of the law that were unquestionably legitimate, Justice Field turned to the Privileges or Immunities Clause itself.[128] In a thorough study of the context in which the Clause was adopted and the history upon which it drew—a history the majority utterly ignored—Justice Field noted the obvious linguistic similarity to the Privileges *and* Immunities Clause of Article IV, and,

124. *Slaughter-House*, 83 U.S. at 74.

125. In fact, the Privileges or Immunities Clause has been invoked for precisely that purpose by Institute for Justice client Erroll Tyler, a Boston entrepreneur seeking to launch a nautical tour company in Cambridge, Massachusetts. *See* Institute for Justice, Massachusetts Nautical Tours: Government Regulators Block New Transportation Alternatives, http://www.ij.org/index.php?option=com_content&task=view&id=676&Itemid=165 (last visited Dec. 16, 2009).

126. *Slaughter-House*, 83 U.S. at 96 (Field, J., dissenting).

127. *Id.* at 87–88.

128. *Id.* at 95.

relying—as did Congress in framing the Amendment—on Justice Bushrod Washington's explanation of privileges and immunities in *Corfield v. Coryell*, concluded that the new Privileges *or* Immunities Clause prevented states from violating the same basic rights identified in *Corfield*.[129] This, of course, included the traditional common law abhorrence of monopolies as a violation of the right of all citizens to the "pursuit of the ordinary avocations of life."[130]

Despite compelling dissents by Justices Field, Miller, and Swayne that utterly demolished the majority's reasoning, *Slaughter-House* effectively eliminated the Privileges or Immunities Clause as a source of meaningful protection for individual rights.[131] Of course, this was warmly received by opponents of the Fourteenth Amendment, many of whom applauded the Court for undoing what they viewed as a national mistake in empowering the federal courts to strike down state laws that interfered with citizens' basic civil rights.[132]

The Clause essentially lay dormant until 1947 when Justice Hugo Black came within a single vote of reviving it as a means of incorporating against the states the Fifth Amendment's guarantee against self-incrimination.[133] The debate between Justices Black and Frankfurter—who wrote a concurring opinion criticizing Black's proposed use of Privileges or Immunities to protect substantive rights—prefigured an academic debate that would stretch over the ensuing decades.[134]

Justice Frankfurter's position was taken up by his protégé, Charles Fairman, who argued that the Privileges or Immunities Clause should not be read to protect substantive

129. *Id.* at 98 (citing Justice Washington's majority opinion in Corfield v. Coryell, 6 F.Cas. 546, 551–52 (C.C.E.D. Pa. 1823); CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866)).

130. *Slaughter-House*, 83 U.S. at 105–06.

131. *See* Calabresi, *supra* note 36.

132. *See generally* Alan Gura, *Heller and the Triumph of Originalist Judicial Engagement: A Response to Judge Harvey Wilkinson*, 56 UCLA L. REV. 1127, 1167 (2009) (citing Michael Anthony Lawrence, *Second Amendment Incorporation Through the Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 22–23 (2007)) (applauding the *Slaughter-House* Court's interpretation of the Fourteenth Amendment).

133. Adamson v. California, 332 U.S. 46, 77–78 (1947) (Black, J., dissenting).

134. *Id.* at 59–67.

rights.[135] Professor Fairman's primary antagonist was William Crosskey, a University of Chicago law professor who sharply criticized Fairman's understanding of the legislative history, particularly his refusal to take seriously the statements of Representative Bingham, who, as described above, was the Fourteenth Amendment's primary author.[136] Fairman's arguments were further dismantled by Michael Kent Curtis's landmark book *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights*—the single most comprehensive treatment of the history of the Fourteenth Amendment.[137] The book concludes that, from an originalist standpoint, the Privileges or Immunities Clause had been plainly and almost universally understood to protect substantive individual rights.[138]

What is striking, given the breadth and ideological diversity of the scholarship, is the consensus of opinion that has emerged: simply put, nearly "everyone" now agrees that *Slaughter-House* misinterpreted the Privileges or Immunities Clause.[139] As described by historian Eric Foner, the *Slaughter-House* majority's conclusions "should have been seriously doubted by anyone who read the Congressional debates of the 1860s."[140] As Professor Thomas McAfee has observed, "this is one of the few important constitutional issues about which virtually every modern commentator is in agreement."[141] Moreover, even the few scholars who defend *Slaughter-House* do so not on the merits, but rather on overtly

135. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

136. *See, e.g.*, Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L. J. 57, 59–74 (1993) (describing and supplementing Crosskey's arguments).

137. CURTIS, *supra* note 45, at 100–05.

138. *Id.*

139. Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 627 (1994); *See also* AMAR, *supra* note 44, at 213 (explaining "[t]he obvious inadequacy—on virtually any reading of the Fourteenth Amendment—powerfully reminds us that interpretations offered in 1873 can be highly unreliable evidence of what was in fact agreed to in 1866–68"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 7–6, at 1321 (3d ed., vol. 1 2000) ("The textual and historical case for treating the Privileges or Immunities Clause as the primary source of federal protection and state rights-infringement is very powerful indeed.").

140. FONER, *supra* note 114, at 530.

141. Thomas B. McAffee, *Constitutional Interpretation—the Uses and Limitations of Original Intent*, 12 U. DAYTON L. REV. 275, 282 (1986).

pragmatic grounds—i.e., that reinvigorating the Privileges or Immunities Clause would have undesirable consequences such as requiring judicial protection for currently disfavored rights like private property and occupational freedom—the very same grounds upon which the majority based its decision in the *Slaughter-House Cases.*[142]

*Slaughter-House* did more than just misinterpret the Privileges or Immunities Clause. It fundamentally warped the Supreme Court's jurisprudence of rights in manner that persists to this day. Having defied the will of the people by draining the Fourteenth Amendment of any real force, the Court left itself in the untenable position of either standing by while state and local officials continued to trample basic civil rights, or figuring out some way to sidestep its original mistake. And that was how substantive due process was born, a doctrine the Court pressed into service in order to protect substantive rights without revisiting its interpretation of the Privileges or Immunities Clause in *Slaughter-House.*[143]

The Court's reliance on substantive due process has had a number of negative consequences for individual-rights jurisprudence. First and foremost is the rather obvious textual problem. As John Hart Ely memorably quipped, the notion of "substantive due process" strikes some as being akin to "green pastel redness."[144] By contrast, the term "privileges or immunities"—which 19th century Americans appear to have used interchangeably with "rights"—needs no gloss or embellishment to do its job.[145]

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142. Jeffrey Rosen, *Textualism and the Civil War Amendment*, 66 GEO. WASH. L. REV. 1241, 1268 (1998):

> [W]e can make a conscientious effort to resurrect the Privileges or Immunities Clause in its original context, but only if we are willing to look into the abyss and to acknowledge the fact that the practical consequences of a privileges or immunities revival would be, for nearly all of us, unacceptable.

143. *See* Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 Yale L.J. 643, 734-35 (2000) (explaining the meaning and background of Substantive Due Process and how it allowed the court to protect substantive rights without overruling *Slaughter-House*).

144. *Id.* at 18. Of course, the fact that substantive due process has been subjected to criticism does not make that criticism correct or the doctrine wholly illegitimate. *See, e.g.*, James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315 (1999).

145. *Cf.* Saenz v. Roe, 526 U.S. 489, 527–28 (1999) (Thomas, J., dissenting); Brennan v. Stewart, 834 F.2d 1248, 1256 (5th Cir. 1988) ("[I]t would be more conceptually elegant to think of [protected] substantive rights as 'privileges or immunities of citizens of the United States' . . . .").

Strengthening the ties between the Court's jurisprudence and the Constitution's actual text and history would not only increase the perceived legitimacy of the Court's individual-rights jurisprudence, it would give *content* to that jurisprudence. Because the debates and contemporaneous public documents surrounding the Fourteenth Amendment are replete with references to specific doctrines and even court cases the Framers meant to overturn, along with the specific evils they meant to prevent, the rights protected by the Privileges or Immunities Clause can be rooted solidly in both text and history, as can their limits.[146] The Clause is neither a meaningless nullity nor a freewheeling source of rights pulled from thin air. Relying on the Privileges or Immunities Clause would both help the Court outline the contours of its role in protecting individuals from rights violations by state governments and make that role more stable and difficult to assail.

In short, the Supreme Court read the Privileges or Immunities Clause out of the Constitution, not because of any genuine lack of clarity about what the Clause was meant to do, but simply because the Court found the change in federal-state relations that the Clause enacted unsettling. But that is obviously not a solid basis for principled jurisprudence.

## V. PROSPECTS FOR THE FUTURE

Why does any of this matter? The debates over the Fourteenth Amendment and the Supreme Court's evisceration of the Privileges or Immunities Clause came more than a century ago. The butchers who brought the *Slaughter-House Cases* are long dead. But the issue remains alive today—in large part because the Supreme Court's misreading of the Privileges or Immunities Clause continues to have a direct impact on people's lives. In the 1950s, only 4.5% of the workforce needed a government license in order to do their job—these were largely doctors, lawyers,

146. *Cf.* Rhode Island v. Massachusetts, 37 U.S. 657, 658 (1838) ("In the construction of the constitution, we must . . . examine the state of things existing when it was framed and adopted, to ascertain the old law, the mischief and the remedy.") (internal citation omitted).

architects, and similar professionals.[147] Today, nearly 30% of the workforce needs the government's permission in order to earn a living.[148] Rather than protecting public health or safety, these new licensing requirements often serve as nothing but naked economic protectionism for politically favored interest groups.[149] But many if not most of today's occupational licensing laws are just as plainly illegitimate as the nineteenth-century laws that were aimed at keeping freedmen in a state of constructive servitude by fencing around their livelihoods with arbitrary and oppressive restrictions.[150]

The abandonment of any meaningful judicial protection for economic liberty has yielded predictable and tragic results. For example:

- Louisiana requires florists to have a license from the state, for which they must pass an incredibly subjective practical exam that is graded by existing licensees.[151] Despite its obviously anti-competitive purpose and lack of genuine public purpose, the law was upheld by a federal district judge in 2005.[152]
- African hair braiders in many states have been shut down and harassed for not having a cosmetology license, a process that takes up to 1,600 hours of mostly irrelevant training.[153]

147. Institute for Justice, Grassroots Tyranny in the Cradle of the Constitution, http://www.ij.org/index.php?option=com_content&task=view&id=2185 (last visited Dec. 16, 2009) (citing MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION 1 (Upjohn Institute 2006)).

148. MORRIS M. KLEINER & ALAN B. KRUEGER, NATIONAL BUREAU OF ECONOMIC RESEARCH, THE PREVALENCE AND EFFECTS OF OCCUPATIONAL LICENSING 6 (2008), http://www.nber.org/papers/w14308.

149. *See* Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 25 (1976) (arguing that "[o]nly the credulous can conclude that licensure is in the main intended to protect the public rather than those who have been licensed or, perhaps in some instances, those who do the licensing").

150. David E. Bernstein, *Licensing Law: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 SAN DIEGO L. REV. 89–90 (1994).

151. Meadows v. Odom, 360 F. Supp. 2d 639, 639–640 (2005).

152. *Id.*

153. *See* Cornwell v. Cal. Bd. of Barbering and Cosmetology, 962 F. Supp. 1260, 1272 (S.D. Cal. 1997) (noting that only sixty-five hours of the required instruction covered health and safety matters).

- Several states allow only licensed funeral directors to sell caskets, which results in price markups of up to 600%.[154]
- Three states regulate who may practice interior design,[155] a harmless vocation that poses no bona fide threat to public health, safety, or welfare.

The Supreme Court's incentive to reconsider *Slaughter-House* is diminished by the fact that it has already incorporated most of the substantive protections of the Bill of Rights against the states using the doctrine of substantive due process.[156] The Court has also protected a number of unenumerated rights through that doctrine,[157] though many—including the right to earn a living—have been relegated to "nonfundamental" status, meaning they are recognized but not meaningfully protected. The ideal test case, then, is one presenting an indisputably fundamental, preferably enumerated right that has never been incorporated against the states:[158] The right to keep and bear arms fits that bill perfectly.[159]

In its 2008 landmark decision *District of Columbia v. Heller*, the Supreme Court held for the first time that the Second Amendment protects an individual right to keep and bear arms.[160] That decision resolved a longstanding and contentious constitutional debate,[161] but it left open up a pressing question—given that the Second Amendment protects a right to keep and bear arms against infringement

154. Brief for the Funeral Consumers Alliance as Amicus Curiae Supporting Petitioners, Powers v. Harris, 125 S. Ct. 1638 (2004) (No. 04-716), 2004 WL 3017734.

155. FLA. STAT. § 481.223 (2006); LA. REV. STAT. ANN. § 37:3176(A)(1) (2007); NEV. REV. STAT. § 623.360(1)(c) (1997).

156. *E.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925).

157. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (expressing the idea that the set of unenumerated rights protected through substantive due process does not overlap perfectly with the set of rights meant to be protected by the Privileges or Immunities Clause, with economic liberty being the most important omission).

158. *But see* Saenz v. Roe, 526 U.S. 489, 527–28 (1999) (Thomas, J., dissenting) (suggesting a willingness to reconsider the Privileges or Immunities Clause in an appropriate case).

159. U.S. CONST. amend. II.

160. 128 S. Ct. 2783, 2799 (2008).

161. *See generally* Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349 (2000).

by the federal government,[162] does the Constitution prevent state and local governments from infringing upon the right to keep and bear arms, and, if so, how? The Supreme Court specifically avoided that question in *Heller*, but it has been squarely presented in several cases that have made, or are still making, their way to the Supreme Court one year later.[163]

Thus, immediately after the *Heller* decision came down, gun-rights advocates filed several lawsuits challenging various gun laws in Chicago and its surrounding suburbs.[164] Since then, the Second Circuit Court of Appeals has held that the federal Constitution does not protect the right to keep and bear arms from state infringement,[165] while the Ninth Circuit Court of Appeals has held that it does.[166]

The Supreme Court will likely resolve the question of whether the Fourteenth Amendment protects the right to keep and bear arms against infringement by state and local governments[167], and in doing so, it will have an essentially clean slate upon which to write. The only Supreme Court opinions to even discuss the issue followed shortly after *Slaughter-House* and held, not only that the federal Constitution placed no limits on state gun laws, but also that it did not protect the rights of free speech or assembly.[168] Those cases are obviously outdated, and their underlying premise, that the Fourteenth Amendment does not protect

162. Provisions of the federal Bill of Rights apply directly to the District of Columbia, which is a creature of the federal government. *E.g.* Pernell v. Southall Realty, 416 U.S. 363, 370 (1974).

163. Maloney v. Cuomo, 554 F.3d 56 (2d Cir. 2008); Nordyke v. King, 563 F.3d 439 (9th Cir. 2009).

164. *E.g.*, McDonald v. City of Chi., No. 08-C-3645, 2008 U.S. Dist. LEXIS 98133, at *2 (N.D. Ill. Dec. 4, 2008).

165. *Maloney*, 554 F.3d at 58–59.

166. *Nordyke*, 563 F.3d at 464–65. The Ninth Circuit has ordered a rehearing en banc, and oral argument is set for September 23, 2009, which is theoretically enough time for the en banc panel to issue a decision before the Supreme Court resolving the pending cert petitions in the Second and Seventh Circuit cases. 2009 U.S. App. LEXIS 16908 (9th Cir.).

167. McDonald v. City of Chi., 130 S. Ct. 48 (2009).

168. *See* Presser v. Illinois, 116 U.S. 252, 267–68 (1886) (explaining that "[t]he only clause in the constitution which, upon any pretense, could be said to have any relation whatever to his right to associate with others as a military company, is found in the first amendment") ); United States v. Cruikshank, 92 U.S. 542, 552 (1876) (noting that "[the First Amendment], like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National government alone").

substantive rights against state infringement, has not simply been undermined but affirmatively disavowed.[169]

Any honest reexamination of the Supreme Court's jurisprudence will indicate that it has been protecting some rights, like free speech, incorrectly by incorporating them through the Due Process Clause rather than simply recognizing them as part of the inherent rights of citizenship protected under the Privileges or Immunities Clause. Other rights, like economic liberty, have been all but ignored, despite playing as important a role in the thinking of the framers of the Fourteenth Amendment as those enumerated in the Bill of Rights.[170] The country—and the Constitution—deserve nothing less than this level of honesty.

This means that what the Supreme Court does with the gun-control question has consequences that run far deeper than gun regulations. As demonstrated above, the record is abundantly clear that the Privileges or Immunities Clause was meant to protect a right to armed self-defense by preventing the forcible disarmament that became all too common in the Reconstruction South.[171] But it is equally clear that the clause is meant to protect other rights, like the right to work in the trade of one's choice, that the Supreme Court jurisprudence continues to give a short shrift.

## VI. CONCLUSION

The Fourteenth Amendment marked a revolution in American constitutional law and the jurisprudence of liberty. Unfortunately, the Supreme Court initially resisted that revolution because five Justices in *Slaughter-House* thought it would be improvident. The Court has yet to confront that mistake or fully acknowledge its refusal to implement the will of the people as expressed in their founding document. The Court has a unique opportunity to revisit *Slaughter-House* now and begin repairing the damage that decision did to the rule of law and the fundamental principles of liberty in America.

169. *Heller*, 128 S. Ct. at 2813 n.23.

170. Wilson Pasley, *The Revival of "Privileges or Immunities" and the Controversy Over State Bar Admission Requirements: The Makings of a Future Constitutional Dilemma?* 11 WM. & MARY BILL RTS. J. 1239, 1266 (2003) (noting that some scholars assert that the Framers of the Fourteenth Amendment intended that the Privileges or Immunities Clause protect economic liberties).

171. AMAR, *supra* note 44, at 264.

While we cannot know exactly where that path might lead, there has never been any reason in this country to fear fidelity to the Constitution.

# SET THE DEFAULT TO OPEN: *PLESSY'S* MEANING IN THE TWENTY-FIRST CENTURY AND HOW TECHNOLOGY PUTS THE INDIVIDUAL BACK AT THE CENTER OF LIFE, LIBERTY, AND GOVERNMENT

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The authors are grateful to John Anastaplo Scharbach, Senior Editor of the Texas Review of Law and Politics, for his many substantial contributions to this Article.

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## I. INTRODUCTION

Rugged individualism and religious and economic freedom are among the most important factors that have contributed to the growth of U.S. global power and prestige and the welfare of its citizens since the founding of the original colonies. The trajectory of freedom has not always been smooth; however, the United States has remained a powerful example of the benefits and resilience of constitutional democracy. It has weathered a civil war and two world wars, grown from the shores of the Atlantic to the northern reaches of the Pacific, become a global economic and technological powerhouse, and even treated the great wound of slavery.

In the midst of this success the underlying tension in constitutional democracy—the force behind U.S. power and prestige—has the capacity to muddle the national vision. Tension between individual rights and the state is not new. It stretches from antiquity to the Renaissance to the modern world. The U.S. Constitution represents an attempt to codify the social contract between the government and its citizens in an enduring document that supports a functioning government and society.[1]

During the 220 years since its ratification, we have repeatedly revisited the fundamental elements of this social contract. Since the initial Bill of Rights, we have added seventeen amendments to the Constitution, and our constitutional jurisprudence has advanced far beyond the common law we inherited from Great Britain. One case in particular, *Plessy v. Ferguson*,[2] highlighted

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1. Richard Primus, *An Introduction to the Nature of American Rights*, *in* THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND 15, 17–18 (Barry Alan Shain ed., 2007). See also, "The meaning of open," Jonathan Rosenberg, Senior Vice President, Product Management, Google, http://googleblog.blogspot.com/2009/12/meaning-of-open.html, last visited Jan. 7, 2010. ("As Google product managers, you are building something that will outlast all of us, and none of us can imagine all the ways Google will grow and touch people's lives. In that way, we are like our colleague Vint Cerf, who didn't know exactly how many networks would want to be part of this "Internet" so he set the default to open. Vint certainly got it right. I believe we will too.") We assert that the blessings of liberty will best be secured when the Internet is fully open both to "networks" and to individuals, empowering individuals to use the Internet to fully participate in commerce and government as each sees fit – socially, economically, politically, administratively, and otherwise.

2. 163 U.S. 537 (1896).

the tension between the government and the individual more than any other case in its time. Before *Plessy*, the Civil War Amendments sought not only to end the slavery that was countenanced in the original Constitution,[3] but also to protect the individual rights of all citizens at the State level.[4] *Plessy* eviscerated that goal with its abhorrent doctrine of "separate but equal."[5] Although the Supreme Court later overturned the "separate but equal" doctrine in *Brown v. Board of Education*,[6] the tension between group rights and individual rights remained. This tension continues today due to the recent extraordinary growth in the size and power of the federal government in areas as personal as retirement, education, and health care.

The expansion of federal power has been accompanied by accelerating development and use of technology. From curing disease and increasing food quality and supply, to the space shuttle and the iPhone, technology has revolutionized how individuals live and communicate. The Internet, one of the most significant advances in technology, has the capacity to change how the social contract is executed. By enabling speedy and robust communication, it can fundamentally alter the individual's relationship with the state. Ultimately, the Internet has the capability to perform the traditional governmental function of aggregating individual power. Thus, the Internet holds the potential to facilitate the casteless and classless society described in Justice John Marshall Harlan's dissent in *Plessy*.[7]

## II. SUMMARY

Contemplating the future requires understanding our nation's trajectory. This Article will briefly review the history of individual rights and their expression in civil society. This

3. U.S. CONST. amend. XIII § 1.
4. U.S. CONST. amend. XIV § 1.
5. Plessy v. Ferguson, 163 U.S. 537, 537 (1896).
6. 347 U.S. 483 (1954).
7. *Id* at 559:

> [I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

(Harlan, J., dissenting).

overview will demonstrate how *Plessy* was a significant detour from the path of social, commercial, and constitutional history, laying a foundation for the Article's discussion of technology's potential to facilitate Harlan's vision. The Article's second section will advance a variety of retrospective and prospective examples of how information technology enhances individual rights and the rule of law, and how government and government services can be reoriented around the individual.

## III. THE SHIFTING BALANCE BETWEEN THE INDIVIDUAL AND THE STATE

The many ways power has been used, abused, centralized, decentralized, aggregated, disaggregated, usurped, and dispersed is the stuff of history, a story that is still unfolding. From Chairman Mao's dictum that "power comes from the barrel of a gun,"[8] to the United States' founding premise of a government designed by "We the People,"[9] wherein "all men are created equal,"[10] the discussion of power and governance remains vital.

Americans have always had an uneasy relationship with the state. The first wave of immigrants from Europe was comprised of religious minorities fleeing monarchies.[11] Pioneers seeking economic freedom and success followed in their wake.[12] Under British rule, the relationship between the colonists and their home government was uneasy.[13] To maintain the sanctity of their unalienable rights, representatives of the colonies formally declared their independence in July 1776,[14] an act that was formally recognized by Great Britain in 1783 with the Treaty of Paris.[15] Four years later, the Constitution was formally ratified,[16] but some of the tension between the state and the individual remained.

8. DALAI LAMA, FREEDOM IN EXILE 263 (1990).

9. U.S. CONST. pmbl.

10. DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

11. WAYNE A CORNELIUS, CONTROLLING IMMIGRATION 62 (2004).

12. *Id.*

13. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

14. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see generally* James H. Hutson, *The Emergence of the Modern Concept of a Right in America*, *in* THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND 25 (Barry Alan Shain ed., 2007).

15. Paris Peace Treaty, U.S.-U.K., Sep. 3, 1783, 1 U.S.T. 586.

16. U.S. CONST.

## IV. INDIVIDUAL RIGHTS

The relationship between the individual and the state has shifted dramatically since the founding of the United States. Some causes of that shift are pragmatic, while others are technological or legal. The Framers designed the Constitution to protect liberty by limiting the government's power. They crafted a set of mechanisms to balance the edifices of power—legislative, executive, and judicial; State and federal—against one another, in order to prevent the government from being turned against the very individual rights it was meant to protect.[17] They did not simply write a list of positive rights and entitlements for citizens. Instead, they drafted a list of negative injunctions against the government,[18] thereby limiting its power.

The Framer's limited enumeration of federal powers—which includes the regulation of interstate commerce, coinage, and declaration of war—did not contemplate disaster relief, price controls, education, housing, or substantive corporate activity as federal functions.[19] At the time, federal involvement in such areas would have been seen as an infringement upon liberty.[20] The American Constitution treated government as a mechanism to secure individual rights, not a tool to redistribute the fruits from exercising those rights to others. The Constitution focuses on individual rights from different perspectives. From the Privileges and Immunities clause,[21] to free speech,[22] freedom of the press,[23] the right of assembly,[24] and the Takings Clause;[25] the Framers had the foresight to put a number of mechanisms in place to protect the individual. The branches of government

17. THE FEDERALIST NO. 47, at 239–240 (James Madison) (Lawrence Goldman ed., 2008).

18. U.S. CONST. amend. I–X (Most of the guarantees in the Bill of Rights are prohibitions on government actions. Only the Sixth and Seventh Amendments have positive guarantees: the right to a speedy trial and the right to a jury).

19. *See* MICHAEL CONANT, THE CONSTITUTION AND ECONOMIC REGULATION 1 (Transaction Publishers, 2008) (1991) ("A national constitution is primarily a political document whose main function is to create a structure of government and a set of limitations on government to protect individual rights.").

20. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *134 ("[P]ersonal liberty consists in the power or locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law.").

21. U.S. CONST. art. IV, § 2, cl. 1.

22. U.S. CONST. amend. I.

23. *Id.*

24. *Id.*

25. U.S. CONST. amend. V.

created by the Constitution were vital to the organs of power; however, the Framers did far more than create institutions. They sought to ensure the unalienable individual rights endowed by the Creator and to protect the property rights associated with individuals:

> Indeed, it is crucial to appreciate the connection between rights and property, to think of all rights as "property," broadly understood, as goods "owned" by the individual and by no one else. For that is the key to distinguishing true from false "entitlements"—things to which one holds title—as Locke and the Founders clearly understood.[26]

Understood this way, the Fifth Amendment Takings Clause protects a vital and permanent individual right. When drafted, taking of property was conceived of in the agrarian sense, as taking land from a private person for the public good. More recently, the Supreme Court's decision in *Kelo v. City of New London*[27] led to legislative and constitutional actions in the States to prohibit takings for the greater *private* good.[28] The scope of property has broadened since Madison penned the Fifth Amendment and now includes identity and intellectual property. This puta "virtual rights" at the center of modern notions of property as society explores multi-dimensional connections that may themselves be considered property in the era of the Internet.

## V. RECONSTRUCTION AMENDMENTS THROUGH *PLESSY*

The ideals of liberty and equality, for which the Civil War was fought to save the Union, were formalized in the Thirteenth, Fourteenth and Fifteenth Amendments.[29] Regretfully, the opportunity these amendments presented to rebalance individual and founding liberties were lost through a series of poorly decided Supreme Court cases. If the Court had

26. Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1, 13–14 (1998).

27. 545 U.S. 469 (2005) (ruling that private property could be taken as part of a private development plan for economic development).

28. For an introductory look at State action after *Kelo*, see 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE *KELO*, CASTLECOALITION.ORG (Dec. 2008), http://www.castlecoalition.org/index.php?option=com_content&task=view&id=2412&Itemid=129.

29. U.S. CONST. amend. XIII–XV.

interpreted these amendments to restore the rights of *all* individuals, then the civil rights laws of the mid-twentieth century might never have been necessary.

Franklin Delano Roosevelt and the New Deal Era decisively shifted the balance toward an overarching and overweening federal government and against individual rights.[30] However, the trend had already started with the *Slaughter-House Cases*[31] and *Plessy*,[32] which all but rendered the Reconstruction Amendments dead upon their arrival.[33] In these and other cases, the federal government's guarantees of individual rights were ruled either to be wholly redundant, like the Privileges and Immunities Clause,[34] or so watered down that they could not effectively check government power, like the rational-basis review of the Due Process Clause.[35]

The text of the Fourteenth Amendment seems to broaden dramatically the scope of individual rights and to safeguard them against the power of the government.[36] The Fourteenth Amendment has four basic rights-granting provisions: (1) it grants citizenship to all people "born or naturalized in the United States,"[37] (2) it prohibits the States from abridging the "privileges or immunities of citizens of the United States,"[38] (3) it creates a Due Process Clause applicable to the States,[39] and (4) it mandates equal protection of the laws.[40] Wholly devoid of any race-specific language, "the focus of the [Fourteenth] amendment was not the abolition of racial discrimination per se, but rather the protection of fundamental rights generally."[41] As drafted, it was designed to grant citizenship to all persons born

30. *See, e.g.*, Richard Epstein, *The Proper Scope of the Commerce Power,* 73 VA. L. REV. 1387 (1987) (elaborating on the growth of the Commerce Clause in the New Deal era); Richard Epstein, *The Mistakes of 1937,* 11 GEO. MASON L. REV. 5 (Winter 1988) (discussing post-1937 legislation).

31. 83 U.S. 36 (1873).

32. *Plessy,* 163 U.S. 537.

33. Barry Friedman, *Reconstructing Reconstruction: Some Problems for Originalists (and Everyone Else, Too),* 11 U. PA. J. CONST. L. 1201, 1224 (2009).

34. *Id.* at 1226.

35. *See* United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (applying the rational-basis review of the Due Process clause).

36. U.S. CONST. amend. XIV.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. EARL M. MALTZ, THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION 71 (2003).

or naturalized in the United States and to protect the rights of those citizens from the power of their government.[42]

### A. *The* Slaughter-House Cases

After ratification, the exact scope and operation of the Fourteenth Amendment was left to the courts' interpretation. In a pivotal decision, the Supreme Court in *Slaughter-House*[43] effectively wrote the Privileges or Immunities Clause out of the Fourteenth Amendment.[44] The Court came to its conclusion through a three-step process. First, it interpreted the Fourteenth Amendment as primarily focused on protecting the rights of newly freed slaves, as *opposed* to broadly protecting of individual rights.[45] Second, it interpreted the Citizenship or Naturalization Clause[46] to create a bifurcated system of citizenship, not to grant citizenship to newly freed slaves.[47] Thus, all the citizens of the United States had both federal citizenship and State citizenship,[48] each of which granted different rights.[49] Third, the Court ruled that the Privileges or Immunities Clause only protected the rights granted by federal citizenship,[50] which only conveyed a handful of relatively minor rights like access to navigable waterways and running for federal office.[51] Because of the Court's holding, the Fourteenth Amendment's Privileges or Immunities Clause only granted a circumscribed set of rights. According to Justice Field's dissent, these legal gymnastics reduced the Fourteenth Amendment to "a vain and idle enactment which accomplished nothing."[52]

42. *Id.* at 58–61.
43. 83 U.S. 36 (1873).
44. HOWARD J. GRAHAM, EVERYMAN'S CONSTITUTION 134 (1968) ("Justice Miller's *Slaughter-House* opinion . . . moved majestically, almost irresistibly, from the Trumbull-Carpenter premises [of bifurcated citizenship] to the practical absurdity that the Fourteenth Amendment effected no fundamental change either in the content of the national citizenship or in the scope of Congressional power.").
45. The Slaughter-House Cases, 83 U.S. 36, 37 (1873).
46. U.S. CONST. amend. XIV, § 1.
47. *Slaughter-House*, 83 U.S. at 53.
48. *Id.*
49. *Id.* at 53–54.
50. *Id.* at 53.
51. *Id.* at 79–80.
52. *Id.* at 96 (Field, J., dissenting).

## B. Plessy v. Ferguson

What *Slaughter-House* did in interpreting the Privileges or Immunities Clause, *Plessy* echoed for the Equal Protection Clause.[53] *Plessy* upheld the constitutionality of government-imposed segregation, finding that segregation was constitutional as long as the separate facilities were equal.[54] Only Justice Harlan dissented from the Court's decision, making a strong argument for equal individual rights in his dissent:[55]

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.[56]

If the dissent in *Plessy* had been the majority opinion, our Constitution would not only be legally color-blind, but the goals of individual liberty would also have been reaffirmed at the turn of the century. The Framers sought to embed those individual protections in the original Constitution, and the Civil War Amendments could have reaffirmed them in *Plessy*.

The implications of this missed opportunity are beginning to accelerate as government institutions seek to take over more and more of the decisions best left in the hands of individuals. Although *Brown v. The Board of Education* rid us of the notion of "separate but equal,"[57] it did not rebalance the relationship between government and individuals. Restoring the rights of the individual is vital to a continued success as a fully functioning civil society. Several centuries ago, people escaped the monarchies of Europe by fleeing to another continent. Today, it is possible to escape virtually rather than physically, and mechanisms like the Internet are potentially a new foundation for the revived social contract of the twenty-first century.

53. *Plessy*, 163 U.S. 537.
54. *Id.* at 548-49.
55. *Id.* at 552–64 (Harlan, J., dissenting).
56. *Id.* at 559 (Harlan, J., dissenting).
57. 347 U.S. at 495 (internal quotations omitted).

## VI. GROWTH AND EXPANSION OF GOVERNMENT

The Reconstruction Amendments and their jurisprudence are only part of the story. As the courts were interpreting the legal scope of individual rights, there was a parallel development in the field of federalism. First, the federal government's powers were expanded dramatically by the enforcement provisions of the Reconstruction Amendments.[58] Later, direct election of senators reduced State legislatures' control over the federal government.[59] Finally, with the help of a pliable court and a national crisis, Franklin Delano Roosevelt dramatically expanded the federal government with his New Deal.[60] This section examines the growth of the federal government and how the changes of the twentieth century—both legal and societal—enabled that growth.

National defense and international diplomacy are appropriate functions of a strong, unified national government. The Departments of State and War were original members of the first cabinet.[61] The addition of the Department of Commerce in 1903, then called the Department of Commerce and Labor, was also arguably appropriate for the increasing complexity of interstate commerce in the midst of the industrial revolution.[62] However, the argument for federal involvement becomes more tenuous when the growth of federal legislation extends to roads, schools, and health care. As the number of agencies increases and the scope of their authority intensifies, the government is no longer just regulating commerce among the States, it is increasingly *becoming* commerce and thus supplanting its original limited constitutional role.

As noted above, the Founders did not design the Constitution to grant a series of positive individual rights. Rather, they

58. *See* U.S. CONST. amend. XIII § 2, XIV § 5, XV § 2 (granting Congress power to enforce the provisions of these amendments).

59. *See* U.S. CONST. art. I, § 3, cl. 1, amended by U.S. CONST. amend. XVII § 1; *see also* John W. Dean, *FindLaw Forum: Should the 17th Amendment Be Repealed?*, CNN.COM, LAWCENTER, http://archives.cnn.com/2002/LAW/09/17/fl.dean.17th.amendment (last visited Dec. 19, 2009).

60. *See* Gary M. Anderson & Robert D. Tollison, *Congressional Influence and Patterns of New Deal Spending, 1933–1939*, 34 J. L. & ECON. 161 (1991) (discussing the growth of the federal government and changing spending patterns during the Great Depression).

61. M. HINSDALE, A HISTORY OF THE PRESIDENT'S CABINET, 1–16 (1991).

62. FREDERIC AUSTIN OGG, THE AMERICAN NATION: A HISTORY, VOLUME 27, NATIONAL PROGRESS, 1907–1917 132 (1918) ("By the close of the century the growing complexity of the industrial situation called for better facilities of investigation and control. . . . Congress created a Department of Commerce and Labor.").

designed it to limit the power of the government.[63] The rights that are granted are, for the most part, negative rights—freedoms from government.[64] The Framers created a system of checks and balances in order to prevent any one branch from becoming too powerful.[65] They also created a tension of power between the States and federal government.[66] The premise was that government was a threat to liberty; therefore by limiting its power liberty would be preserved.[67] It is important to keep this conflict between government and liberty in mind when studying the explosion of government in the past century.

### A. *The Death of the Tenth Amendment and the Growth of the Administrative State*

The shift in the balance of power between the state and the individual that began with *Slaughter-House*[68] and *Plessy*[69] was dramatically accelerated with the jurisprudence of the New Deal Era.[70] The last bulwark against an overweening federal government—the Tenth Amendment—was all but interpreted out of the Constitution.[71] In expansively interpreting the Commerce Clause, the courts gave the federal government an almost unlimited power.[72] Though it has recently begun to reign in federal power under the Commerce Clause,[73] the Court

63. Conant, *supra* note 19, at 22 ("The second general objective of the federal Constitution is to guarantee the civil rights of persons within the United States through specified limitations on the powers of governments.").

64. *E.g.*, U.S. CONST. amend. I–X.

65. THE FEDERALIST NO. 47, at 239 (James Madison) (Lawrence Goldman ed., 2008) (examining separation-of-powers).

66. *See* U.S. CONST. amend. 10 (explicitly observing that the federal government is one of limited powers).

67. *See* THE FEDERALIST NO. 51, at 56 (James Madison) (explaining the necessity and structure of separation-of-powers).

68. *Slaughter-House*, 83 U.S. 36.

69. *Plessy*, 163 U.S. 537.

70. Epstein, *supra* note 30.

71. *See* United States v. Darby Lumber Co., 312 U.S. 100, 124 (1941) (holding that Congress has the power under the Commerce Clause to regulate employment conditions and finding the Tenth Amendment was "but a truism").

72. *See id.*, Wickard v. Filburn, 317 U.S. 111 (1942) (holding Congress has the power to regulate production of crops for self-consumption).

73. *See* United States v. Lopez, 514 U.S. 549 (1995) (ruling the Commerce Clause does not justify regulating guns in school zones), United States v. Morrison, 529 U.S. 598 (2000) (ruling the Commerce Clause does not justify providing civil remedies to victims of gender-motivated crimes), Seminole Tribe v. Florida, 517 U.S. 44 (1996) (ruling the Indian commerce clause did not grant Congress authority to abrogate the states' sovereign immunity).

does not seem prepared to roll back completely the post-New Deal jurisprudence.[74]

These legal shifts, combined with dramatically increased federal revenues following World War II,[75] have allowed an explosion in the size and power of the federal government[76] at the expense of States.[77] Paralleling the growth of the federal government, society's attitude towards government has changed dramatically since the founding. Historically, Americans viewed the federal government with distrust.[78] The size and power of the federal government proposed in 1787—tame by today's standards—was a subject of heated debate.[79] The level of comfort Americans have with the size and scope of their government today suggests that the growth of the federal government is not merely a legal development, but also a societal development.

### *B. Shifting Roles of Government*

> *In media, shopping, travel, entertainment and music we have huge choice and control, from many organisations that offer us incredible service and value. But when it comes to the things we ask from politics, government and the state—there is a sense of power and control draining away; having to take what you're given, with someone else pulling the strings.*[80]

This distinction between individuals and institutions is an important one. Like any institution, government is an aggregation of individuals. In our early days as a country, we

74. Gonzales v. Raich, 545 U.S. 1 (2005) (upholding the federal government's power to regulate intrastate use of marijuana under the Commerce Clause).

75. WILLIAM D. ANDREWS & PETER J. WIEDENBECK, BASIC FEDERAL INCOME TAXATION 5–7 (6th ed. 2009) (giving a brief history of the federal income tax).

76. *See generally* J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L. J. 757 (2003) (discussing how regulatory law has exponentially grown); Robert C. Ellickson, *Taming the Leviathan: Will the Centralizing Tide of the Twentieth Century Continue into the Twenty-First?*, 74 S. CAL. L. REV. 101 (discussing the explosion of the length and complexity of statutes and regulations over the twentieth century).

77. Pete Du Pont, *Federalism in the Twenty-First Century: Will States Exist?*, 16 HARV. J. L. & PUB. POL'Y 137, 137 (1993).

78. THE FEDERALIST NO. 17, at 84 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

79. THE FEDERALIST NO. 45, at 228 (James Madison) (Lawrence Goldman ed., 2008).

80. David Cameron, U.K. Leader of the Conservative Party, Fixing Broken Politics (May 26, 2009) *available at* http://www.epolitix.com/latestnews/article-detail/newsarticle/david-cameron-fixing-broken-politics-speech-in-full/.

were first aggregated as colonies,[81] then as a Confederation,[82] and finally as a Union through the Constitution.[83] The citizens were paramount to the governments they established. The Framers decided how their government would function and laid a specific framework to achieve their noble goals. They decided how they wanted to balance their individual rights with the necessity of aggregation. The Framers wanted individuals to come first and the institution they were creating to come second. Thus, they designed a government with individual rights in mind—even before the adoption of the Bill of Rights:

> The contention that the classical theory of rights stood behind the Constitution from the start, even before the Bill of Rights was added "for extra caution," is only buttressed by the realization that the Privileges and Immunities Clause was already there in the original, unamended Constitution, ready to limit the federal government as its authors surely meant it to, prior to the addition of the Bill of Rights.[84]

The American Constitution, with its various rights, checks, balances, and enumerated powers was designed in light of our human flaws and the implications of unchecked power. However, the Constitution was not designed to handle the challenges that would occur if government itself became imbued with an animus of its own, separate from the will of the people. Webster's dictionary defines statism as: the "concentration of economic controls and planning in the hands of a highly centralized government."[85] With TARP[86] and government-ownership of General Motors, Chrysler, and other interventions into private enterprise, we observe statism in various aspects of the American economic landscape.[87]

Rather than step back from intervention, it appears that state control is becoming fundamental. Recent actions by the "Pay

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81. Lance Banning, *From Confederation to Constitution: the Revolutionary Context of the Great Convention* in THE CONSTITUTION: OUR ENDURING LEGACY 23, 27 (James MacGregor Burns et al. eds., 1986).

82. *Id.* at 29.

83. W. CLEONSKOUSEN, THE MAKING OF AMERICA: THE SUBSTANCE AND MEANING OF THE CONSTITUTION 162 (National Center for Constitutional Studies, 1955).

84. Shankman & Pilon, *supra* note 26 at 20.

85. WEBSTER'S NEW COLLEGIATE DICTIONARY 1152 (9th ed. 1983).

86. Emergency Economic Stabilization Act of 2008, 12 U.S.C. §§ 5201, 5211–5241, 5251–5253, 5261 (2008).

87. David Boaz, *This Slippery Slope Isn't Steep, It's Nearly Vertical,* MODESTO BEE, Nov. 15, 2009, *available at* 2009 WLNR 22970019.

Czar" to dictate the pay of executives in companies receiving federal financial support[88] and current health care legislation[89] indicate increasing state control. Notwithstanding its form or the industry to which it is applied, statism destroys personal sovereignty and therefore contradicts founding constitutional principles. While federal intrusion into interstate commerce, beyond mere regulation of, is one example of a threat to personal sovereignty,[90] the use of the government to deliver services directly poses a more significant threat to liberty and commerce.[91] Overreaching regulation of national and global commerce interferes with market clearing mechanisms, typically resulting in shortages and surpluses;[92] the transformation of economic activity, from commercial activity to governmental activity, doesn't distort market mechanisms – it destroys them.

As government grows, people are more likely to see government as a service provider, not an administrator of the social contract or protector of individual rights.[93] The idea that there is a "government" existing independently of its citizens threatens to become firmly embedded in our consciousness as a society. The government is frequently invoked as the solution to any number of societal concerns, commercial crises, or natural catastrophes. "The government" should have done more in the wake of Hurricane Katrina,[94] "the government" needs to lower the price of prescription drugs,[95] "the government" needs to improve our schools, "the government" needs to make housing

88. Stephen Gandel, *Pay Czar*, TIME, Nov. 9, 2009, at 30.

89. See Janet Adamy & Naftali Bendavid, *House Passes Health-Care Reform Bill in Historic Vote*, WALL ST. J., Nov. 8, 2009, *available at* http://online.wsj.com/article/SB125757198373535753.html and Associated Press, *Senate Dems eye finish line for health bill: Obama, American Medical Association praise legislation after crucial vote*, MSNBC.COM, Dec. 21, 2009, http://www.msnbc.msn.com/id/34498942.

90. For a historical overview of the development of the Commerce Clause, *see* Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of* United States v. Lopez *and* United States v. Morrison, 68 TENN. L. REV. 605 (2001).

91. See 514 U.S. 549 (1995).

92. A classic example of shortages occurred under natural gas price controls in the 1970s. A more recent example of surpluses is housing, which was overbuilt because of excess demand caused by a variety of policies, including preferential tax treatment for home mortgage interest, capital gains preferences for real estate gains and federal sponsorship of entities created to securitize mortgages.

93. *See generally* DAVID KELLEY, A LIFE OF ONE'S OWN (1998) (explaining the historical evolution of the Welfare State).

94. *See* Michael Ignatieff, *The Broken Contract*, N.Y. TIMES, Sept. 25, 2005 § 6.

95. *See* Robert Pear, *A.M.A. Says Government Should Negotiate on Drugs*, N.Y. TIMES, Oct. 17, 2004, § 1 at 18.

more affordable,[96] or "the government" needs to facilitate company acquisitions to prevent a financial Armageddon.[97]

In the absence of technological solutions to address government's perception of people's daily needs, federal powers have usurped what were traditionally personal or local powers.[98] Because individualized solutions are administratively difficult and costly, federal solutions typically use classification schemes to administer government assistance programs. For example, unemployment benefits are allocated based on job loss rather than actual need or specific entitlement.[99] Medicare reimbursements are based on standard procedure costs, not on actual costs for particular patients.[100] The effect of such policies is that individuals are treated unequally. Government—particularly a massive national government—is a blunt instrument. It must distribute entitlement benefits based on large group classifications. It cannot manage the administrative burden of subjectivity and must therefore choose putatively objective standards, which necessarily discriminate among beneficiaries and all citizens. This creates inequalities among beneficiaries, and more broadly, among all citizens. Some contribute large amounts of money toward the public good by voluntarily creating value for society and then paying taxes on that value. Others may contribute little value while deriving significant benefit. Notwithstanding Justice Harlan's eloquent argument that "in the eye of the law, there is in this country no

96. *See* C. Theodore Koebel & Cara L. Bailey, *State Policies and Programs to Preserve Federally Assisted Low-Income Housing*, 3 HOUSING POLICY DEBATE 995 (1992).

97. *See* Stephen Labaton, *Trying to Rein in 'Too Big to Fail' Institutions*, N.Y. TIMES, Oct. 25, 2009, at A1.

98. For example, as of November 2009, Congress was considering expanding federally provided health care from retirees to working Americans, potentially resulting in unequal medical treatment for people based on their work status. Editorial, *ObamaCare's Tax on Work*, WALL ST. J., Oct. 18, 2009, *available at* http://online.wsj.com/article/SB10001424052748704322004574477401457898882.html. The Social Security Act of 1935 provided for a major federal role in retirement savings. Social Security Act, 42 U.S.C. § 401 (2006). The Department of Education Act provided for a major federal role in education. 20 U.S.C. § 3401 (2006). The Economic Opportunity Act of 1964 provided for a major federal role in efforts to reduce poverty. Pub. L. No. 88–452, 78 Stat. 508 (codified as amended in scattered sections of 42 U.S.C. § 2701 (2006)). The Federal Unemployment Insurance Act provided federal funding to subsidize state unemployment insurance. 26 U.S.C. § 3301 (2008).

99. State Unemployment Insurance Benefits (Dec. 2, 2008), http://www.ows.doleta.gov/unemploy/uifactsheet.asp.

100. Overview Prospective Payment System—General Information (Nov. 13, 2009), http://www.cms.hhs.gov/prospmedicarefeesvcpmtgen.

superior, dominant, ruling class of citizens,"[101] the federal government since *Plessy* has become a vehicle to authorize certain citizens employed by the government to grant benefits and sponsor particular transactions subject to the discretion of a "ruling class."[102]

These developments, particularly mandatory income redistribution, have contributed to the "sense of power and control draining away; having to take what you're given, with someone else pulling the strings."[103] Ideally, working to restore a personal sense of power and control should also include effective means to accomplish collective ends, like poverty reduction and universal health care, in a *voluntary* manner that empowers all economic participants. It should transcend the "social dilemma" problem presented by the public goods game[104] that arises when people decline to participate as individuals because they are unable to see that their personal efforts make significant differences in people's lives.[105]

## VII. RESTORING INDIVIDUAL RIGHTS

Rethinking the question of aggregation from the individual's point of view makes the dissent in *Plessy* a powerful opinion as one considers the growing role of the state.[106] This dissent from the end of the nineteenth century remains compelling at the threshold of the twenty-first because even now the challenge presented by the state making economic decisions is that these decisions must result in the creation of both classes and castes.

Freedom from interference by the government is a necessary predicate for people to be able to mobilize themselves as

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101. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

102. Deepak Chopra, *The Discreet Charm of the Ruling Class*, HUFFINGTON POST (Oct. 23, 2007) *available at* http://www.huffingtonpost.com/deepak-chopra/the-discreet-charm-of-the_b_69404.html.

103. Cameron, *supra* note 80.

104. *See generally* Urs Fischbacher, Simon Gachter & Ernst Fehr, *Are People Conditionally Cooperative? Evidence from a Public Goods Experiment*, (Institute for Empirical Research in Economics, University of Zurick, Working Paper No. 16, July 2000) *available at* http://www.iew.uzh.ch/wp/iewwp016.pdf (examining conditional cooperation in a public goods game).

105. Technologies that have attempted to bridge this divide include "peer-to-peer" lending and "donors choose" projects. While these are in their technological infancies, technology that enables more robust handling of personal information would presumably contribute to adoption of these and other new business models to help address public welfare concerns.

106. *Plessy*, 163 U.S. at 552–564 (1896) (Harlan, J., dissenting).

responsible and active citizens. No amount of civic involvement and awareness will be sufficient to mobilize citizens when a government stands athwart. Thus, it is helpful to examine the ways in which technology has been used to spread information and organize individuals, even in the face of hostile government policies.

A. *Historical Overview of Information Technology and Political Change*

Historically, information technology has played a significant role in political thought and action,[107] especially in the United States. New forms of technology have produced new political developments.

The Founders used technology to great avail in the run-up to the American Revolution.[108] Their task was first to aggregate the people into a large insurrection, then later to aggregate the people to agree to a form of government. The authors of the Declaration of Independence explained their preference for personal and local power and control over remote royal power.[109] They emphasized equality and "the consent of the governed"[110] and objected to delays in royal approval of local colonial lawmaking,[111] demands to forego political representation,[112] bureaucratic travel requirements in connection with local governance,[113] dangerous security policies,[114] ineffective immigration policies,[115] and the growth of British bureaucracy in the colonies.[116] The information technology of choice to facilitate the debate about the case for independence was the printing press.[117]

107. *See generally* A NATION TRANSFORMED BY INFORMATION (Alfred D. Chandler, Jr. & James W. Cortada eds., 2000) (discussing how information technology has transformed national history); BRUCE BIMBER, INFORMATION AND AMERICAN DEMOCRACY: TECHNOLOGY IN THE EVOLUTION OF POLITICAL POWER (2003).

108. RICHARD D. BROWN, *Early American Origins of the Information Age*, *in* A NATION TRANSFORMED BY INFORMATION 39 (Alfred D. Chandler Jr. & James W. Cortada eds., Oxford 2000).

109. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

110. *Id.*

111. *Id.*, para. 3–4.

112. *Id.*, para. 5.

113. *Id.*, para. 6.

114. *Id.*, para. 25.

115. *Id.*, para. 9.

116. *Id.*, para. 12.

117. THOMAS R. ADAMS, AMERICAN INDEPENDENCE: THE GROWTH OF AN IDEA xi (Jenkins and Reese 1980) (1965).

Several years after the Revolutionary War, communication technologies of the era brought together many of the same activists to frame the Constitution.[118] The power to regulate interstate commerce in the Constitution[119] was among the most powerful positive federal authorities[120] proposed by the Framers. Again, the printing press was the information technology of choice, publishing both the Federalist and Anti-Federalist Papers.[121]

Subsequent constitutional law developments, particularly the majority opinion in the *Plessy* case, neglected the plain language of equality in the Declaration when they interpreted the Constitution's expansive Civil War Amendments.[122] While some telecommunication technology was available at the time of *Plessy*, the primary communications tool remained the printing press.[123]

Motion pictures and radio broadcasts were pervasive by the middle of the twentieth century. As more Americans saw stark pictures of southern injustice and victims began to be known as real people via the media instead of printed names in newspapers, and as civil rights leaders personally appealed to growing audiences, the Court remedied its primary *Plessy* error in *Brown v. Board of Education.*[124] However, other private and government classifications, such as income distinctions, affirmative action, and targeted public assistance based on socio-

118. *See* MICHAEL WARNER, THE LETTERS OF THE REPUBLIC (1990)(describing the framing of the Constitution).

119. U.S. CONST. art I, § 8. The powers to tax and coin money, while important, lack equivalent universal application. Neither every person nor even every U.S. citizen engages in taxable activity or uses U.S. money. On the other hand, anyone who engages in any activity that "so affect[s] commerce . . . as to make [federal] regulation of them appropriate" is subject to explicitly broad powers granted to Congress. United States v. Darby Lumber Co., 312 U.S. 100, 118 (1941).

120. Powerful negative authorities include bans on abridging free speech and religion and on the federal government exercising authorities not explicitly granted to it by the Constitution.

121. *See* Warner, *supra* note 118.

122. Abraham Lincoln did not mistakenly neglect to consider the Constitution in context of the Declaration like the *Plessy* Court. Regarding the author of the Declaration, Lincoln said,

> All honor to Jefferson—to the man who, in the concrete pressure of a struggle for national independence by a single people, had the coolness, forecast, and capacity to introduce into a merely revolutionary document, an abstract truth, applicable to all men and all times.

Letter from Abraham Lincoln to Henry L. Pierce and Others (April 6, 1859), *reprinted in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859–1865, at 19 (Don E. Fehrenbacker ed., 1989).

123. Warner, *supra* note 118.

124. 349 U.S. 294, 298 (1955).

economic data, belied Justice Harlan's view that "Our constitution is color-blind, and neither knows nor tolerates classes among citizens."[125]

Commentators credit the successful passage of the Civil Rights Act of 1964 in part to President Kennedy's effective use of television before his assassination.[126] Visual representations of the chaos at the 1968 Democratic National Convention created a fear of disorder which contributed to the election of President Nixon.[127] Broadcasts of the Vietnam War were credited for the public pressure that resulted in the U.S. withdrawal.[128] In each case, technology's delivery of increasingly vivid pictures of leadership, disorder, and violence may have caused results, or at least timing of results, that were different than they may have been in the absence of such technology.

After World War II, highly progressive marginal tax rates—up to 95%[129]—along with federal expansion of retirement, health care, energy, and education policies, caused the formation of conservative, libertarian, and objectivist movements in opposition.[130] The development of airmail, high-speed rail service, and the technology to support multiple printing locations for national publications facilitated the development of these various movements.[131] Both the economic "malaise" of the late 1970's[132] and the election of President Reagan, who, like President Kennedy, made extraordinarily effective use of

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125. 163 U.S. 537, 559.

126. John F. Kennedy, Radio and Television Report to the American People on Civil Rights (June 11, 1963) *available at* http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/003POF03CivilRights06111963.htm.

127. John Schultz, *"The Substance of the Crime was a State of Mind"—How a Mainstream, Middle Class Jury Came to War with Itself*, 68 UMKC L. REV. 637, 639 (2000).

128. Glen Sulmary & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1840 (2007). *But see* Michael Linfield, *Hear No Evil, See No Evil, Speak No Evil: The Press and the Persian Gulf War*, 25 BEVERLY HILLS B. ASS'N J. 142, 145 (1991).

129. TAX POLICY CENTER, HISTORICAL HIGHEST MARGINAL INCOME TAX RATES, *available at* http://www.taxpolicycenter.org/taxfacts/content/PDF/toprate_historical.pdf.

130. LEE EDWARDS, THE CONSERVATIVE REVOLUTION: THE MOVEMENT THAT REMADE AMERICA (1999).

131. *E.g.*, Edward A Keogh, *A Brief History of the Air Mail Service of the U.S. Post Office Department* (May 15 1918–August 31, 1927), http://www.airmailpioneers.org/history/Sagahistory.htm (last visited Dec. 19, 2009); Randy James, *High Speed Rail*, (Apr. 20, 2009), http://www.time.com/time/nation/article/0,8599,1892463,00.html.

132. Edwards, *supra* note 130.

broadcast technology to accomplish his goals, was attributed to the economic consequences of these technological developments. President Reagan utilized his communication skills—honed in radio, film, and television—to become one of the greatest political communicators of modern times.[133] While he was able to use his communication skills to reduce marginal tax rates, those skills and the communications technology of the time proved incapable of permanently reducing the growth of government-mandated social benefits. If President Reagan had access to today's significantly more robust interactive communications technology, the impact of his Presidency may have been more effective on the spending side as well.

Using technology to shape fundamental constitutional issues continued with the publication of the House Republican "Contract with America" in TV Guide in 1994. This, combined with the use of talk radio, resulted in the first change of party control of the U.S. House of Representatives in forty years.[134] In a similar use of technology, President Obama's highly Internet-based 2008 campaign promised dramatic "change"; while the subsequent realities of governing, without the tightly choreographed script of a campaign was attributed to information published by "new" media, like the Fox News Channel.[135] The development of information technology during the late nineteenth and twentieth centuries accelerated at increasing rates,[136] as did the development of legal policy.[137]

It is true that some developments in technologies contributed to a range of catastrophes: the Civil War, World War I,[138]

133. *See generally* FREDERICK J., JR. et al., RONALD REAGAN: THE GREAT COMMUNICATOR (2003) (analyzing Reagan's skill with communication technology).

134. JOHN B. BADER, TAKING THE INITIATIVE: LEADERSHIP AGENDAS IN CONGRESS AND THE "CONTRACT WITH AMERICA" 172 (Georgetown University Press 2007) (1996).

135. Ann Samer, *Obama Advisers Say Fox News Isn't News*, AOL NEWS, Oct. 18, 2009, http://news.aol.com/article/white-house-advisers-say-fox-news-is-not/722055.

136. *See* Harro van Lente & Arie Rip, *Expectations in Technological Developments: An Example of Prospective Structures to be Filled in by Agency*, *in* GETTING NEW TECHNOLOGIES TOGETHER: STUDIES IN MAKING SOCIOTECHNICAL ORDER 206 (Cornelius Disco & Barend van der Meulin, eds., 1998) (Moore's Law predicts the "regular, periodic doubling of the number of 'gates' (a measure of complexity)" in computer processor technology).

137. *See* Ruhl & Salzman, *supra* note 76 and accompanying text; Ellickson *supra* note 76 and accompanying text.

138. Maree Cullen, *World War One and its Aftermath: 1914-1921*, (Nov. 27, 2002),http://www.faculty.edfac.usyd.edu.au/projects/NSWhistory/arp_resources/world_war_one_and_its_afte.htm.

political disasters in Germany, the Soviet Union, and China,[139] the capability of a relatively small group of terrorists to leverage construction and aircraft technology to accomplish the September 11th attacks, and the creation of an unsustainable market in asset-backed securities leading to the 2008 economic crisis.[140] The technologies that facilitated so much destruction are also those that improved the ability of individuals to control mass opinion or to imprison and kill large numbers of individuals. These are unlike other technologies which facilitate person-to-person communications, disperse risk, and empower a well-informed citizenry to defeat violence, aggression, and deceit. The technology that facilitated television pictures of violence from Vietnam was credited with ending the war in Indochina. The surveillance technology that kept al Qaeda on the run was credited with disrupting subsequent terrorist attacks. And the technology that makes public company financial statements available to the market—first on paper, then microfilm, microfiche,[141] EDGAR, and now via eXtensible Business Reporting Language (XBRL)[142]—has made public company investing safer than asset-backed security investing to which no equivalent disclosure mechanism was applied. This technology of disclosure has at its heart a concern for the

139. *See, e.g.*, STEPHANIE COURTOIS ET AL., THE BLACKBOOK OF COMMUNISM 175–76 (Jonathan Murphy trans., Mark Kramer ed., 1999) (explaining how the "passportization" of 27 million people in 1933 facilitated mass deportations from various cities and the deaths of many deportees).

140. *See* Hitachi Data Interactive, XBRL: An Interview with Paul Wilkinson (Part 1), http://hitachidatainteractive.com/2009/10/29/xbrl-an-interview-with-paul-wilkinson-part-1 (last visited Dec. 19, 2009) ("As we've seen with ABS, keeping disclosure regulation up-to-date with financial innovation is critical. Over the past decade, one reason capital flowed disproportionately to ABS relative to public companies is because regulators used proven manual systems to keep GAAP (Generally Accepted Accounting Principles required to be applied to public company finances) up to date. SOX (the Sarbanes Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745) was expensive. It helped prevent more Enrons and WorldComs, but at the same time, it drove capital toward non-GAAP investments. Despite Reg. AB (Regulation AB, 70 Fed. Reg. 1506, 1508 (Jan. 7, 2005)) (to be codified at 17 C.F.R. 210, 228–229, 232, 239, 240, 242, 245, and 249), which was generally a codification of many years of asset-backed securitization legal practice, ABS financial practices continued to evolve, contributing to both the housing bubble and to the growth of multi-layered complex securities on top of basic ABS.").

141. SEC Commissioner Richard B. Smith, Cleveland Regional Group of the American Society of Corporate Secretaries, *available at* http://www.sec.gov/news/speech/1970/041670smith.pdf. ("Well, the first difficulty I mentioned, dissemination of the periodic reports outside the Commission, has been substantially improved by the microfiche system inaugurated more than a year ago. Copies of any periodic report filed with the Commission are quickly available to any member of the public who chooses to pay for them.").

142. *See infra*, note 199.

individual rights of the "common man"[143] to allocate capital to industry as he saw fit. Keeping today's capital markets open to the "common man" mitigates the chance of excessive power being given to or taken by the government and is therefore important to individual rights.

B. *Modern Developments for Information Technology and Dissent*

In June 2009, the U.S. State Department sought the assistance of the social networking service Twitter to empower Iranians to communicate with each other about a disputed election.[144] While the number of Iranians who used Twitter to communicate during the election crisis is uncertain,[145] the phenomena attracted global attention because of efforts by the Iranian Government to limit communications. YouTube videos have also been used to document actions by the government of Iran to limit protests.[146]

In November 2009, Chinese citizens worked to overcome the "Great Firewall of China," a state-run barrier to any information that could foment discord against the Communist dictatorship.[147] Chinese who were eager to celebrate the twentieth anniversary of the Berlin Wall's collapse set up a "Berlin Twitter Wall" to share memories and to discuss other barriers to freedom that should be removed.[148] Earlier in 2009, the People's Republic of China (PRC) government had mandated software on all personal computers in China, ostensibly for the purpose of protecting children from

143. SEC Commissioner A. A. Sommer, Jr., "Differential Disclosure: To Each His Own," *available at* http://www.sec.gov/news/speech/1974/031974sommer.pdf ("This 'common man' concept has been expressed repeatedly in Commission rules and determinations and court decisions relating to standards of materiality.").

144. Sue Pleming, *U.S. State Department Speaks to Twitter Over Iran*, REUTERS, June 16. 2009, *available at* http://www.reuters.com/article/rbssTechMediaTelecomNews/idUSWBT01137420090616.

145. Ravi Somaiya, *The Revolution Will Not Be Tweeted Because Only 0.027% of Iranians Are on Twitter*, GAWKER, Nov. 9, 2009, *available at* http://gawker.com/5400268/the-revolution-will-not-be-tweeted-because-only-0027-of-iranians-are-on-twitter.

146. Matthew Weaver & Saeed Kamli Dehghan, *New Protests in Iran*, GUARDIAN, Nov. 4, 2009, *available at* http://www.guardian.co.uk/world/blog/2009/nov/04/iran-student-day-protests.

147. Aileen McCabe, *Chinese Netizens Leap Great Firewall of China to Mark Berlin Wall's 20th*, VANCOUVER SUN, Nov. 6, 2009, *available at* http://www.vancouversun.com/technology/Chinese+netizens+leap+Great+Firewall+China+mark+Berlin+Wall+20th/2193355/story.html.

148. *Id.*

inappropriate content, but then dropped its plan after concerns about the use of the software to limit political speech spread around the world on the Internet.[149] The Internet appears to have generated disagreement within the PRC government itself. While Minister for Public Security, Meng Jianzhu, was concerned about "weak links in social regulation," the PRC's Ministry of Culture accused the PRC's General Administration of Press and Publication of acting without authority in attempting to ban a new version of the online game World of Warcraft.[150]

The government of Russia, understanding how difficult it is to win a race against communications technology, appears to prefer intimidation to control Internet conduct and content. The founder of a human-rights Web site was reportedly shot in the head by police in what officials suggested was an "accident," and bloggers have been charged with inciting hatred for criticizing law enforcement.[151] By one account, seventeen journalists have been assassinated in Russia since 2000.[152]

In order to make the Internet a more powerful tool to promote freedom abroad, the U.S. Congress repeatedly considered legislation entitled the Global Internet Freedom Act.[153] The 2009 version of the bill would provide authority to sanction U.S. companies for failing to protect the identity of people using the Internet to promote freedom abroad and would create a U.S. State Department Office of Global Internet Freedom. Previous versions of the bill called for the development and deployment of U.S. technology to defeat Internet jamming and censorship by oppressive foreign governments.

149. *See China Bureaucratic War Over Online Warcraft Heats Up*, Reuters, Nov. 4, 2009, *available at* http://www.reuters.com/article/technologyNews/idUSTRE5A32Ge20091104.

150. *Id.*

151. Alastair Gee, *Russia's Dissident Bloggers Fear for Their Lives*, U.S. NEWS, Sept. 30, 2008, *available at* http://www.usnews.com/articles/news/world/2008/09/30/russias-dissident-bloggers-fear-for-their-lives.html.

152. David Satter, *Journalism of Intimidation*, FORBES, July 2, 2009, *available at* http://www.forbes.com/2009/07/07/paul-klebnikov-murder-opinions-david-satter.html.

153. H.R. 2271, 111th Cong.; H.R. 275, 110th Cong; H.R. 4780, 109th Cong.; H.R. 48, 108th Cong.; H.R. 5524, 107th Cong.

### C. *President Obama's Administration, Mass Organization and the Future*

Political professionals—a class of campaign consultants and cable television "talking heads" the framers would have found abhorrent to their values—express increasing frustration with the "tone" of political discourse.[154] Internet-induced changes in the news media market structure cause national and global news content providers to experiment with more subjective professional journalism.[155] Tangible democratic results embody dynamism and disruptive technology.[156] The premise of representative democracy—that while public passions can flutter about at undesirable speed, institutional constraints can effectively moderate excessive wavering[157]—is particularly relevant in light of the development of real time tools that exponentially increase the ability millions of individuals to collaborate.[158] Elections to offices of constitutional responsibility are far more important than selecting a winner on American Idol, but as decision-making technologies converge and advance,[159] those responsible for implementing the technology must be concerned that the medium of decision-making supports appropriate contemplation by the message senders.

Among the questions that arise as communications economics evolve is whether money will become more or less important in politics. While websites and e-mail campaigns are much less expensive than national television campaigns, the movement of

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154. *E.g.*, *Glen Beck: Obama Is a Racist*, ASSOCIATED PRESS, July 29, 2009, http://www.cbsnews.com/stores/2009/07/29/politics/main5195604.shtml, Scott Whitlock, *MSNBC's Chris Matthews Visibly Frustrated After Being Taunted for Leg Tingle*, NEWSBUSTERS, Nov. 4, 2009, http://newsbusters.org/blogs/scott-whitlock/2009/11/04/msnbc-s-chris-matthews-visibly-frustrated-after-being-taunted-leg-ti.

155. *E.g.*, MSNBC.com, Countdown with Keith Obermann, http://www.msnbc.msn.com/id/3036677 (last visited Dec. 19, 2009); FOX News, Sean Hannity, http://www.foxnews.com/bios/talent/sean-hannity/ (last visited Dec. 19, 2009).

156. *See*, Organizing for America, http://my.barackobama.com (last visited Dec. 19, 2009) (an online community of organizers behind Barack Obama).

157. THE FEDERALIST NO. 10 (James Madison) (Lawrence Goldman ed., 2008).

158. *Cf.* Google Wave, http://wave.google.com (last visited Dec. 19, 2009) (allowing visitors to communicate and collaborate in real time), American Idol FAQs, http://www.americanidol.com/faq (last visited Dec. 19, 2009) (explaining the game show's interactive voting component).

159. *See* Mike Godwin, *Superhuman Imagination: Vernor Vinge on Science Fiction, the Singularity, and the State*, REASON, May 2007, http://reason.com/archives/2007/05/04/superhuman-imagination (speculating about Benjamin Franklin's interest in "the Singularity").

voter eyeballs from prime time to Facebook and other Internet platforms has changed communication-economics in yet-to-be understood ways.[160] Will money become more important as political professionals seek positive attention for their chosen candidates? Or will political campaigns go the way of music promotion, where the returns on investments in marketing super bands and mega acts have evaporated when faced with competition from the "long tail" of content and talent that is now easily available to music consumers?[161] Or are the economics of film promotion more applicable, where low-budget productions can now use Internet word-of-mouth to compete with studio-produced entertainment which costs hundreds of millions of dollars to produce?[162] With an ever-increasing amount of content on the Internet available for free,[163] will political decision-making continue to generate sufficient revenue to employ the professional political class? Or might new leaders emerge who understand how to balance republicanism and democracy, so that the long-term health of national governance is not compromised by short-term fancy for particular ideas that sound good when they are tweeted?

## VIII. RESTORING THE BALANCE BETWEEN CITIZENS AND GOVERNMENT

A well-functioning republic requires not only that its citizens have the opportunity to think, organize, speak, and act for themselves, but also that its citizens capitalize on those opportunities. In examining how to restore a healthier balance between citizens and their government, it is important to realize that this is the balance of distinct entities. Restoring a healthier balance can best be accomplished by strengthening the citizens or by limiting the government. Changing technology creates opportunities for citizens to speak and mobilize, even in the face of governmental opposition.

160. J.P. Freire, The Caucus, *Facebook Pitches Its Political Benefits*, N.Y. TIMES, Oct. 10, 2007, http://thecaucus.blogs.nytimes.com/2007/10/10/facebook-trains-campaigns-to-use-the-web/.

161. *See* Zeb G. Schorr, Note, *The Future of Online Music: Balancing the Interests of Labels, Artists, and the Public*, 3 VA. SPORTS & ENT. L. J. 67 (Fall 2003) (discussing developments in the music industry in a digital age).

162. Mark Steven Bosko, *Cybermarketing: Using the Internet to Promote Your Video*, VIDEOMAKER, Feb. 1998, http://www.videomaker.com/article/3241.

163. *See* CHRIS ANDERSON, FREE: THE FUTURE OF A RADICAL PRICE (2009) (discussing shifting business models and overall price declines of Internet content).

Dramatic technology changes over the past few centuries affect the tension the Framers built into our system. There has always been a functional limit on democratic government because it is difficult to muster the resources for a full referendum whenever an issue needs to be decided. However, the Internet provides a unique opportunity to aggregate many more voices at a scale that was never before imaginable. The Internet presents new ways for pure democracy to challenge Hobbes' Leviathan. The only certain outcome is that the future will be different from the past.

Concepts like crowdsourcing[164] are part of the new vernacular highlighting the impact of the Internet on mainstream thinking and discussion. Is it possible for the Internet to also create a new mechanism for crowdsourcing and "meGovernment?"[165] Can the same ideals that led to the ratification of the Constitution be reinvigorated at the start of the twenty-first century? Can we restore the core principles of individual rights that were at the heart of our Founders' vision 220 years ago?

Although there is a glimmer of hope for a revival of federalism,[166] a set of concurrent developments facilitated by technology and the Internet force us to revisit many decisions to grow government over the past two centuries. While many of these legislative and executive actions may have been wise at the time, when looked at anew, in light of contemporary capabilities and technologies, better approaches to the old problems become apparent. This opportunity to rethink old decisions is both functional and fundamental.

Technology is not a solution in and of itself but is a set of tools to achieve particular goals. The aim is not to sidestep government with technology, but rather to make government's size and physical scope more consistent with principles of liberty while using technology to achieve societal goals – old and new alike – more effectively.

Since the mid-1990's, the Internet has proven to be an unprecedented and remarkably powerful mechanism of

164. Taking tasks traditionally performed by employees or contractors and outsourcing them to a group (crowd) or community in the form of an open call. JEFF HOWE, CROWDSOURCING: WHY THE POWER OF THE CROWD IS DRIVING THE FUTURE OF BUSINESS 1–6 (2008).

165. meGovernment is the application of technology to deliver government services in a highly customized, personal, unique, and individual-oriented way.

166. *See supra* note 73 and accompanying text.

communication and aggregation. If government is a mechanism to aggregate the activities and protect the rights of individuals, then the power of sites like Facebook, MySpace, LinkedIn, and other tools should help us think anew about government mechanisms and their future roles as aggregators of individuals.

### A. *Changing Delivery Methods*

The States and the national government alike jumped into the Internet and eCommerce revolution, seeking to harness the same tools and technologies to deliver government services via the Internet. The authors of this Article have served in different capacities to advance technological approaches at the state and federal levels.

Our particular experiences with eGovernment[167] inform our perspective on the ability of the Internet to deliver government services and to create a more symmetric information flow for investing. Moreover, our experiences inform a perspective on how these technologies can go further to transform both the delivery of services and the more efficient and transparent regulation of market participants. If they are tapped more aggressively, these tools can facilitate more innovative approaches to eGovernment in the twenty-first century and perhaps lead to a meGovernment.

To fully understand the implications of technology on government and government services, it is useful to examine retrospective and prospective examples of eGovernment. The capability of technology to improve commerce is already clear in the private sector. As technology continues its rapid advance, the public sector has the opportunity to learn from these examples and simultaneously advance the rights of individuals, decreasing the burden of government and more efficiently aggregating services appropriate for a civil society.

When the eGovernment Task Force in Texas was first formed in late 1999, the legislative mandate required that the Governor's appointees achieve two fairly basic goals: (1) initiate

167. Gary Thompson served on both an eGovernment Task Force authorized by the Seventy-Sixth Legislature of the State of Texas and the ensuing Texas Online Authority, created by the Seventy-Seventh Legislature. Paul Wilkinson was Senior Advisor to U.S. Securities and Exchange Commission Chairman Christopher Cox, 2005–2009, and oversaw the adoption of XBRL.

several pilot projects[168] and (2) make recommendations on necessary legislation to further advance eGovernment in Texas.[169] Initially, the idea that you could go online instead of stand in a line to renew your driver's license was novel. However, that service and others, like renewing your vehicle registration, were advanced.[170] Over time, additional legislation put all professional licenses online[171] and several initiatives tied in city and county governments. Harris County, for example, used the Texas Online platform for the payment of traffic tickets in its jurisdiction.[172]

Over time, Texas Online became more ambitious, seeking to harness technology to streamline even more functions of government, including courts. Working with judicial agencies and partnering with the private sector, Texas Online laid the foundation for filing court documents electronically.[173] This would not only lower the costs of filing incurred by parties to litigation, but it would also strengthen the courts' ability to handle increasingly complex cases with multiple filings. However, a few members, including one of the authors, became concerned that Texas Online was simply putting digital wrappers on existing processes, instead of digging deeper into the processes and reinventing them based on the power of technology. This was a result of putting the government before the "e," rather than the "e" before the government. Texas Online was built on the 1999–2003 period's understanding of the Internet and technology. A few years later, the U.S. Securities and Exchange Commission (SEC) was able to harness technologies from the 2005–2009 period.[174] While these experiences were separated by only a few years, the pace of technology development during that brief time contributed to significant implementation differences.

168. Texas SB 974, 76th Leg. Reg. Sess. § 2054.062(b) (1999).

169. Texas SB 974, 76th Leg. Reg. Sess. § 2054.062(e) (1999).

170. *Texas Government Goes Online*, VICTORIA ADVOCATE, Sept. 30, 2000, at A11.

171. *See, e.g.*, Texas State Board of Plumbing Examiners, Online Services, http://www.tsbpe.state.tx.us/online-renewal.html (last visited Dec. 19, 2009) (listing the full suite of services for online plumbing licensing).

172. Ticket/Pay, Online Ticket Payment System, City of Houston, http://www.texasonline.state.tx.us/NASApp/rap/apps/chotpa/jsp/eng/welcome.jsp (last visited Dec. 19, 2009).

173. Texas Online, eFiling for Courts: eFiling Main Information, http://www.texasonline.com/portal/tol/en/info (last visited Dec. 19, 2009).

174. *See* U.S. Securities and Exchange Commission, Office of Interactive Disclosure, http://www.sec.gov/spotlight/xbrl/what-is-idata.shtml (last visited Dec. 19, 2009).

These examples are an illustrative snapshot of approaches to eGovernment. However, with rapidly increasing capabilities and greater adoption of both the wired and wireless Internet, the opportunities ahead are exciting because of the innovative ways in which new services can be delivered and the ability to reorient the way in which we "aggregate" to solve problems in the private and public sectors. In the past decade, the power of technology has advanced, and those advances inform the potential for more dramatic meGovernment initiatives for the twenty-first century.

If there is no government independent of its people, there can be no services independent of the people for whom the services are designed. Practically speaking, this means that rather than routing tax dollars through one government agency, the IRS, to be allocated by a legislative body, the U.S. Congress, and then spent by another agency, the Internet and e-commerce can support more innovative and efficient models to achieve similar results at lower costs and with fewer restrictions on personal freedom.

Through the power of technology and the interconnectedness afforded to us by the Internet, the aggregation power of the government is no longer unique. The following prospective examples highlight areas of government that were originally designed in light of limitations that no longer exist. Each example looks at the delivery of the associated services from the perspective of the individual rather than the institution. By putting the "e" before government, meGovernment can be achieved in both cases.

The Department of Veterans Affairs (VA) example looks at the prospect of meGovernment from a delivery perspective. The Commerce, Education and Labor example shows how regulation can be delivered virtually rather than through institutions that are focused more on bureaucratic sustainability than on the goals agencies were created to achieve. Each example looks at meGovernment from an outward-facing perspective.

As the health care debate unfolds,[175] the VA duplicates functions performed elsewhere in the public and private sectors that could be improved by the more elegant use of technology as an aggregator of services.

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175. *Supra* note 91.

In order to deliver health care to veterans, the VA has developed a large system of staff, hospitals and other facilities.[176] In light of the defense of freedom by soldiers and veterans, this commitment of health care resources to veterans is fitting. Yet these services do not require replicating health care systems that already exist. Technology and meGovernment can remove the federal government from this delivery paradigm and improve the focus of public and private resources on better and broader support of our veterans.

Certain health care assets are required to treat the unique injuries and circumstances that occur on the battlefield. Front line doctors in the theater of war reflect that reality; ongoing care once the battle is won must reflect it too. Burn centers like those in San Antonio, Texas reflect this excellence in veterans' care.[177] Beyond using the Internet to provide maps to these facilities and contact information, however, advances in technology could reorient the entire paradigm of care and payment, reducing the cost and friction in the system while expanding the delivery and quality of care. The intersection of two technology-enabled tools makes a meGovernment approach to veteran health care possible. The first tool is tagging. To understand tagging, we can look at Flickr.[178] Flickr is an Internet service that lets users upload photos to share with friends and tag those photos with names or descriptions.[179] The second technology tool, the electronic benefit card, has also become common. Many States use the functionality of credit and debit cards to electronically distribute benefits and funds directly to recipients.[180] Combining these tools can unshackle VA health care from its physical infrastructure.

A robust mechanism that would tag a veteran's personal information and health needs with the appropriate privacy and

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176. *See generally*, United States Department of Veteran's Affairs, Fact Sheet: Facts about the Department of Veterans Affairs (2009), http://www1.va.gov/opa/fact/vafacts.asp (last visited Dec. 19, 2009) (stating that the VA health care system includes 153 medical centers and more than 1,400 sites of care).

177. The Brook Army Medical Center in San Antonio, TX, has a Burn Center verified within the DoD. SAMMC: San Antonio Military Medical Center, http://www.sammc.amedd.army.mil (last visited Dec. 19, 2009).

178. Flickr, http://www.flickr.com (last visited Dec. 19, 2009).

179. *Id.*

180. Electronic Benefit Transfer has been used in all 50 states since June of 2004. Electronic Benefit Transfer (EBT), http://www.fns.usda.gov/snap/ebt (last visited Dec. 19, 2009).

control over that information at the veteran's command. Thiscould support the transformation of the physical silos of the VA health care system into a virtual delivery system. This reduction in the duplication of effort would increase personal control for the veteran while freeing resources for better care and enabling government employees to return to the private sector where their talent would be available to veterans – along with the talents of millions of other health professionals.

These tags in the aggregate would create a virtual cloud of information that could be dynamically rearranged based on the unique needs of any individual. The physical structure of the current VA, or any government department, can never be this dynamic. Rather than federal labyrinths of asset maps and distribution mechanisms, individuals could reveal the best choices through their own actions. Services would be expanded and moved from the government back into the hands of the sovereign, "We the People," acting in concert.

### B. *Changing Regulatory Methods*

As the federal government expanded to regulate an increasingly technological nation in the twentieth century, it borrowed practices from the private sector and modified those practices to accomplish its objectives. The following examples show how technology can improve regulation to empower individuals.

Following the stock market crash of 1929 and the subsequent economic crisis, Congress and Franklin Delano Roosevelt's administration assigned the disclosure of important financial information by public companies offering their securities to investors to the Securities and Exchange Commission.[181] Instead of enacting legislation to prohibit individuals from investing in companies that failed to meet certain financial standards, Congress chose to let individuals decide their own investment strategies with the help of information disclosed pursuant to improved accounting standards.

Inadequate disclosure of information to investors in public companies in the 1920s contributed to a stock market bubble[182]

181. JAMES S. OLSON, HISTORICAL DICTIONARY OF THE GREAT DEPRESSION, 1929–1940 252 (Greenwood Press 2001).

182. Howard I. Golden, *Corporate Governance*, *in* COVERING GLOBALIZATION: A HANDBOOK FOR REPORTERS 187–88 (Anya Schriffin & Amer Bisat eds., 2004).

which, when it burst, helped initiate the Depression. In response, Congress granted the Federal Trade Commission and, subsequently, the SEC the authority to require disclosure as a prerequisite to offer and resell securities.[183] While many aspects of the New Deal remain controversial, it is generally agreed that disclosure of material public company information contributed significantly to the world-leading growth of U.S. capital markets.[184]

Disclosure of company information instead of substantive regulation of particular company behavior complied with the main principle of equality expressed in the *Plessy* dissent. Instead of dividing society into classes—some of which were allowed to participate in capital markets while others were deemed insufficiently sophisticated—the full potential of market power was brought to bear on the challenge. Anyone could buy or sell a stock or a bond as long as the company issuing it complied with open and transparent disclosure standards.[185] The sense of power and control among individuals was further enhanced by the repeal of fixed commissions on equity trading in 1975.[186] While the public Social Security system provided one leg of the retirement savings stool, lower cost private investment, including Individual Retirement Accounts and 401(k) plans, comprised a growing second leg.[187] As the system of company disclosure evolved, however, it became increasingly complex: participants deferred to third party analysts to help them make investment decisions. Unfortunately, many analysts turned out to be less than objective.[188] Claims about the potential of the Internet itself became more enticing and easier to believe than the results of standard financial analysis, resulting in another

183. Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1223–27 (1999).

184. *See* FRANK B. CROSS & ROBERT A. PRENTICE, LAW AND CORPORATE FINANCE 133–38 (2007) (discussing the growth of the U.S. markets and corresponding impact on other markets).

185. *See* Jerry W. Markham, *Super Regulator: A Comparative Analysis of Securities and Derivatives Regulation in the United States, the United Kingdom, and Japan*, 28 BROOK. J. INT'L L. 319, 326 n. 34 (2003) (outlining the subsequent statutes applicable to the disclosure requirement).

186. Adoption of Securities Exchange Act Rule 19b-3, Exchange Act Release No. 11, 203, 6 SEC Docket 147 (Jan. 23, 1975).

187. MICHAEL B. SNYDER, DESIGNING AN EFFECTIVE ERISA COMPLIANCE PROGRAM, §§ 1:4, 1:20 (Corporate Compliance Series Vol. 5 2009).

188. Louis E. Ebinger, Note, *Sarbanes-Oxley Section 501(a): No Implied Private Right of Action, and a Call to Congress for an Express Private Right of Action to Enhance Analyst Disclosure*, 93 IOWA L. REV. 1919, 1925–31 (2008).

asset bubble and the subsequent "dot-com crash."[189] Congress then enacted the Sarbanes-Oxley Act[190] mandating additional controls over financial reporting, which proved expensive when performed manually.[191]

To create the original public company disclosure system, the SEC turned to the American Institute of Accountants, which supplied appropriate paper forms for companies to use in filing their financial reports.[192] For nearly three quarters of a century, even though the extent of required disclosure gradually expanded, the format of public company disclosure to the SEC and the markets remained paper.[193] While the SEC's EDGAR (Electronic Data Gathering Analysis and Retrieval) system provided for electronic representation of paper documents starting in the 1990s, it failed to bring the benefits of a database system either to companies or to investors.[194]

In 1998, Charlie Hoffmann, a certified public accountant, developed a tool to represent Generally Accepted Accounting Principles in a version of eXtensible Markup Language (XML) called eXtensible Business Reporting Language (XBRL).[195] The American Institute of Accountants successor organization, the American Institute of Certified Public Accountants (AICPA),[196]

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189. Michael Geist, *Cyberlaw 2.0*, 44 B. C. L. REV. 323, 324 (2003).

190. Sarbanes-Oxley Act of 2002 § 302, 15 U.S.C. § 7241 (2006) (the civil provision), Sarbanes-Oxley Act of 2002 § 906, 18 U.S.C. § 1350 (2006) (criminal provision).

191. The SEC further enhanced its disclosure requirements for public companies with the adoption of data-based disclosure in December 2008. Among the rationales for the adoption of data was more accurate information for investors and potential savings for companies working to mitigate the high costs of manual SOX compliance. Unfortunately, enhanced data disclosure was not applied to asset-backed securities before 2008, contributing to the 2008 financial crisis. Exchange Rule, 17 CFR 240.13a–14b; Exchange Rule 17 CFR 240.15d–14(b) (exempting asset-backed securities from complying with the Sarbanes-Oxley Act's enhanced disclosure requirements).

192. U.S. Securities and Exchange Commission, SEC Approves Interactive Data for Financial Reporting by Public Companies, Mutual Funds, http://www.sec.gov/news/press/2008/2008-300.htm (last visited Dec. 19, 2009).

193. *See generally* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE (Aspen Pub. N.Y. 3d ed. 2003) (detailing the history of the SEC).

194. U.S. Securities and Exchange Commission, Important Information About EDGAR, http://www.sec.gov/edgar/aboutedgar.htm (last visited Dec. 19, 2009).

195. *See An Introduction to XBRL*, XBRL International, http://www.xbrl.org/WhatIsXBRL (last visited Dec. 19, 2009) (giving a brief overview of XBRL); *See generally Key Principles of an XBRL Framework*, CHARTERED FINANCIAL ANALYSTS INSTITUTE, June 23, 2008, *available at* http://www.cfainstitute.org/centre/topics/reporting/pdf/principles_for_XBRL.pdf.

196. American Institute of Certified Public Accountants, http://www.aicpa.org (last visited Dec. 19, 2009).

helped develop the language and played a key role in advancing the federal government's interest in accurate and timely disclosure of material information from public companies.[197] To help its own business processes catch up with modern technology, the SEC began to explore adding XBRL data-based disclosure to its existing document-based disclosure system in 2004.[198]

XBRL empowers individuals in several ways. First, as a nonproprietary, open standard, it is accessible to a large number of potential users at moderate cost.[199] This reduces the information advantages held by highly sophisticated investors who can more easily afford to convert paper format disclosure into data format disclosure.[200] Second, because XBRL information is transmitted from companies to data intermediaries without the need for re-keying or potentially faulty computer parsing, error rates with respect to particular data are considerably lower.[201] Third, improved market access to financial information is likely to result in more competitive capital markets and therefore in a more efficient allocation of capital towards businesses that are able to use it to create the most value.[202]

A fourth advantage has yet to be fully realized because when it mandated the use of XBRL for financial reporting in December 2008, the SEC failed to lift its requirement for traditional document format financial statements.[203] Therefore, direct

197. *See* Karen Kernan, *The Story of Our New Language*, AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, 27–31 (2009) (detailing the adoption of XBRL by the SEC), *available at* http://www.aicpa.org/Professional+Resources/Accounting+and+Auditing/BRAAS/downloads/XBRL_09_web_final.pdf.

198. Securities and Exchange Commission, Press Release No. 2004–97 (July 22, 2004).

199. What Is XBRL?, XBRL International, http://www.XBRL.org/WhatIsXBRL (last visited Dec. 19, 2009).

200. How XBRL Web Services Impact Investors and Financial Analysts, PriceWaterhouseCoopers, http://www.pwc.com/gx/en/xbrl/how-web-services-impact-investors-and-financial-analysts.jhtml (last visited Dec. 19, 2009).

201. Mike Willis & Brad Saegesser, *XBRL: Streaming Credit Risk Management*, CREDIT & FINANCIAL MANAGEMENT REVIEW, (Second Quarter 2003), *available at* http://www.pwc.com/en_GX/gx/xbrl/pdf/pwc_xbrlcrm.pdf.

202. XBRL, The American Institute of Certified Public Accountants, http://www.aicpa.org/Professional+Resources/Accounting+and+Auditing/BRAAS/XBRL.html (last visited Dec. 19, 2009).

203. Interactive Data to Improve Financial Reporting, Securities Act Release No. 9001, Exchange Act Release No. 59,324, Investment Company Act Release No. 28,609, 74 Fed. Reg. 6776 (Jan. 30, 2009) at II(c)(5), *available at*

savings to investors in public companies will be limited to efficiencies created by public companies that reform their financial reporting process by using more efficient data-based systems to produce both their traditional and data statements. Until the dual filing requirement is lifted, investors and the companies in which they invest will not enjoy the full cost-savings potential of automated financial reporting.

The process of creating XBRL "data tags" for U.S. GAAP itself also showed the potential of technology to support more equal treatment of individuals in governance and policy making. While the process of creating accounting principles themselves is rigorous, formal, and controlled by a small group of accounting experts at the Financial Accounting Standards Board in Norwalk Connecticut,[204] the process of creating data tags to represent those accounting principles was open and relatively informal and invited meaningful participation from anyone with potential expertise or judgment.[205] The nonprofit organization formed to create the data tags, XBRL US,[206] used crowdsourcing software called SpiderMonkey[207] to empower anyone with an Internet connection to review draft data tags, comment on them, suggest new tags, and facilitate the integration of this public comment into the development process.[208] While the tag creation process was probably not subject to the Administrative Procedures Act,[209] technology nevertheless made it cost-effective to treat general public comment just as seriously as comment from Wall Street's most elevated classes and castes.[210]

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http://www.sec.gov/rules/final/2009/33-9002.pdf ("The new rules will not eliminate or alter existing filing requirements that financial statements and financial statement schedules be filed in traditional format.").

204. The Mission of the Financial Accounting Standards Board, Facts about the FASB, Financial Accounting Standards Board, http://www.fasb.org/jsp/FASB/Page/SectionPage&cid=1176154526495 (last visited Dec. 19, 2009).

205. *XBRL's GAAP Data Tags Open for Review*, MARYLAND ASS'N OF CPAS, Nov. 25, 2008, *available at* http://www.macpa.org/Content/24633.aspx.

206. About Us, XBRL US, http://xbrl.us/about/pages/default.aspx (last visited Dec. 19, 2009).

207. *SpiderMonkey Captures the Business Reporting Zeitgeist: True Collaboration*, ALLBUSINESS.COM, Dec. 11, 2007, http://www.allbusiness.com/company-activities-management/operations/5324810-1.html.

208. *Id.*

209. 5 U.S.C. 701–706 (2008).

210. *See* Robert Bloom & Mark Myring, *Global Capital Markets and the Global Economy*, ENTREPRENEUR (July–Aug. 2007), *available at* http://www.entrepreneur.com/tradejournals/article/169679338.html (discussing XBRL's potential for user-driven, real time business information).

Based in part on the success of the SEC program, on July 30, 2009, the U.S. House Committee on Oversight and Government Reform unanimously approved H.R. 2392, which requires the use of, and sets criteria for, a common data standard, such as XBRL, for the vast majority of information reported to and by the federal government.[211] The potential benefits of H.R. 2392 include:

- Economies of scale for the creation and improvement of software and systems to process government and private data because multiple components of software to process a single open standard could be reused in multiple data domains;
- Interoperability with international data prepared and tagged according to the standard;[212]
- Common means to validate that reported data fulfills regulatory requirements.

H.R. 2392 was originally promoted to bring transparency to the Troubled Asset Relief Program (TARP).[213] However, the legislation is much more sweeping, promising better regulation of the private and government sectors.[214] In particular, the availability of detailed information about the government's work in a format that can be easily understood and analyzed by its citizens holds the potential to revolutionize government

211. Government Information Transparency Act, H.R. 2392, 111th Cong. (2009).

212. This is particularly true if the standard selected is eXtensible Business Reporting Language, which has been widely adopted abroad. *See* XBRL INERNATIONAL, WORLD WIDE XBRL PROJECTS LISTING (2009), http://www.xbrl.org/BestPractices/WorldWideXBRLProjectsListing-2009-07-15.xls (comparing the XBRL projects of multiple different nations).

213. Aliya Sternstein, *Lawmaker Calls for Bailout Formatting*, NEXTGOV, May 14, 2009, http://techinsider.nextgov.com/2009/05/lawmaker_calls_for_bailout_for.php.

214. *See* Data Interative: News and Commentary from the Hitachi XBRL Business Unit, XBRL: An Interview with Amy Pawlicki of AICPA (Part 2), http://hitachidatainteractive.com/2009/08/03/xbrl-an-interview-with-amy-pawlicki-of-the-aicpa-part-2 (last visited Dec. 19, 2009) ("XBRL can be used as a tool after the fact to help unravel the information (or in some cases lack thereof) that underlies the current credit crisis, but more importantly it should be proactively applied on a go-forward basis to enhance transparency and access to data, thereby helping prevent future crises."). *See also* Gary Greenberg, *Will the SEC Give the Buy Side What It Needs?*, SEEKING ALPHA, June 18, 2009, http://seekingalpha.com/article/143915-will-the-sec-give-the-buy-side-what-it-needs; XBRLSpy, XBRL US and NIEM to Explore Harmonization of Standards for Government Reporting and Technology, http://www.xbrlspy.org/NIEM (last visited Dec. 19, 2009).

oversight, a point not lost on the House Committee on Oversight and Government Reform.

Finally, as a global standard, XBRL's adoption in the United States makes it easier for individuals in the United States to participate in global capital markets.[215] The full benefits of capital market globalization will not be realized until substantive accounting and investment standards reach their full potential. Nevertheless, the computer language to empower individuals to practice borderless investment is in place in capital markets around the world.[216] That individual Americans should not face needless governmental limits on their freedom to choose from a world of opportunity is completely consistent with the spirit of human freedom that was expressed in the Declaration of Independence and in the Constitution.

Second and similar to XBRL, patent law has also enjoyed benefits from crowdsourcing in recent years.[217] The traditionally solitary activity of patent review has been crowdsourced via a system that empowers outside experts to review patent applications.[218] Considering the environment of invention in which the United States Patent and Trademark Office exists, perhaps it should not be surprising that it is at the cutting edge of leveling the playing field for all patent applicants through technology. It is worthwhile to contemplate the potential expansion of similar crowdsourcing to the public comment process from the Patent and Trademark Office to all agencies under the Administrative Procedures Act.[219] Such an expansion could drastically reverse the trend toward viewing the government as a separate entity from "We the People."

The new regulation of American citizens as part of the effort to combat terrorism provides a third example of technology's potential to either infringe on or protect individual rights.

215. *See* Hitachi Data Interactive, XBRL: An Interview with Paul Wilkinson (Part 2), http://www.hitachidatainteractive.com/2009/11/05/xbrl-an-interview-with-Paul-Wilkinson-Part-2 (last visited Dec. 19, 2009) (discussing XBRL's potential to open and integrate world capital markets).

216. *See* Kernan, *supra* note 197 (discussing the global development and implementation of XBRL).

217. *See generally* Beth Simone Noveck, *Wiki Government: How Technology Can Make Government Better, Democracy Stronger, and Citizens More Powerful* (2009) (discussing potential and actual applications of crowdsourcing in the U.S. Patent Office).

218. *See id.* at 12–21 (giving a brief overview of the system developed largely in 2007-2008).

219. 5 U.S.C. 701–706 (2008).

While broad public dissemination of raw data about potential terrorist attacks may remain impracticable at the moment, the Department of Homeland Security (DHS) has attempted to create a proxy for such dissemination in the form of the five-color terrorist threat warning system.[220] Depending upon the threat level, DHS can adjust the level of its interference with travel in the form of more or less stringent airport security screenings.[221] A more efficient system would rely on specific verifiable facts about each traveler whose identity would be absolutely confirmed. Such an approach, however, could raise significant privacy concerns.[222] Ideally, each traveler would be able to fully control the use of his or her own personal information without being able to distort the information in any way that would compromise the DHS mission. As any air traveler knows, technology that supports a convenient, fair, and efficient air travel security system has yet to be deployed, but thinking anew about the problem and thinking imaginatively about technology-based solutions offers some hope.

In the final example, we propose a combination of the Departments of Commerce, Education, and Labor. President Carter signed the Department of Education Organization Act into law on October 17, 1979.[223] The Department began operating on May 4, 1980.[224] The Bureau of Labor, on the other hand, was first established by Congress in 1884[225] and became a cabinet level department in 1913 under President Taft.[226] Regretfully, President Johnson's idea of reuniting Commerce and Labor was never followed. With the advance of technology, the opportunity to reunite them exists today, and such reunification should be understood from the perspective of the individual, not the institutions. Thus, its unification should not just include commerce and labor but also education if it is to maximize efficiency and minimize costs.

220. DEPARTMENT OF HOMELAND SECURITY, HOMELAND SECURITY ADVISORY SYSTEM (2002), *available at* http://www.dhs.gov/xabout/laws/gc_1214592333605.htm.

221. *Id.*

222. *See generally* Sara Kornblatt, *Are Emerging Technologies in Airport Passenger Screening Reasonable Under the Fourth Amendment*, 41 LOY. L.A. L. REV. 385 (2007) (discussing the Fourth Amendment implications of new airport screening technologies).

223. Pub. L. No. 96-88, 93 Stat. 673 (1979).

224. Overview, ED.gov, U.S. Department of Education http://www.ed.gov/about/landing.jhtml (last visited Dec. 19, 2009).

225. JOHN LOMBARDI, LABOR'S VOICE IN THE CABINET 35 (1942).

226. *Id.* at 15.

The lessons learned from Texas Online, XBRL, and other public and private sector digital transformation projects can inform this proposal. As Texas Online electronically enabled the issuance of licenses to professionals ranging from plumbers to cosmetologists,[227] it quickly became clear that building online forms was trivial relative to electronically enabling the regulatory schema. Traditionally, the Texas Department of Licensing and Regulation (TDLR) managed the processes, staff and transformation of legislation and legislative intent into administrative mechanisms for the legislature's licensing goals.[228] With technology and eGovernment, many of those regulatory functions can now be handled completely online,[229] which means the entire department can now be rethought from the ground up.[230] The Departments of Commerce, Education and Labor at the federal level are not dramatically different from TDLR and are ripe for improvement via meGovernment.

At the core of each departments' function is the regulation of talent—in the form of individuals—at some point in the value chain from education to labor to commerce. Some functions in these departments may be extraneous to talent, but as in the Texas Department of Licensing and Regulation, many functions could be streamlined and normalized with tools like XBRL. From the perspective of meGovernment, individuals should not have to go clicking through blue links on web pages to discern which government regulation covers their situation. With the proper tags around different rules, meGovernment can present a personalized portal into the regulatory schema that is relevant to the individual's business, invention or other commercial matter.

Because Commerce, Education and Labor were all established prior to the full flourishing of the Internet, each is architected in a way that contemplates physical structures and processes.

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227. Official Portal of Texas, Online Services, http://www.texasonline.com/portal/tol/en/gov/10 (last visited Dec. 19, 2009).

228. Texas Department of Licensing and Regulations, About the Texas Department of Licensing and Regulation, http://www.license.state.tx.us/about.htm (last visited Dec. 19, 2009).

229. Official Portal of Texas, Online Services, http://www.texasonline.com/portal/tol/en/gov/10 (last visited Dec. 19, 2009).

230. *See generally* BETH SIMONE NOVECK, WIKI GOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER, DEMOCRACY STRONGER, AND CITIZENS MORE POWERFUL (2009) (discussing proposals within the Obama administration to better integrate technology into government).

With the appropriate privacy tools in place, the footprint of each department can be reduced dramatically by putting individuals in charge of themselves. Currently, each department is simply developing, establishing, and enacting regulations and resources that are often related to the same individuals, resulting in a massive duplication of effort. Even worse, this duplication of effort does not only occur at the department level, but in many cases also occurs within the many agencies in each departments as well. Individuals, acting in concert, through the aggregation of the Internet, do not need government to perform these functions for them. Just like XBRL with business reporting, valid standards for talent could help government-enhanced standards in areas ranging from education to unemployment insurance. However, those standards need not result in large bureaucracies when they can be captured online through tagging of data and personal information.

### C. *Implications for Traditional Delivery of Services by Government*

With the power of technology and the Internet, government and service delivery can be decoupled. As we consider new approaches to the delivery, regulation and transparency of the government, we must return to Rousseau's understanding of sovereign and government.[231] The sovereign is each of us as citizens of the United States, giving our consent to be governed. The sovereign gets larger or smaller based on population size. However, government, as an actor for the sovereign, can become smaller. As discussed in this section, smaller government does not need to translate into fewer services or less effective regulation. Technology offers another path forward that lets us rethink and rearchitect the assumptions underlying the creation of various mechanisms of government and yields the opportunity to achieve old goals in new ways. At the same time that we are reducing the physical size of government, lowering the number of government employees, and reducing the friction in the delivery of services, we can simultaneously increase the impact of our shared resources on very real

231. JEAN JACQUES ROUSSEAU, *The Social Contract, Or Principles of Political Right, in* THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 110 (Victory Gourevitch, ed. & trans., Cambridge University Press 1997) ("The Sovereign . . . acts only by means of the laws, and the laws being nothing but authentic acts of general will, the Sovereign can act only when the people is assembled.").

problems. We can create a new federalism by reconnecting individuals with each other, with the sovereign, and with our government. This new treatise of government builds on the vision of John Locke, enabled by twenty-first century technology.

## IX. CONCLUSION

At the threshold of the second decade of the twenty-first century, America's grand constitutional experiment, while at risk from a growing imbalance between the state and individuals, remains a "shining city upon a hill."[232] We are no longer alone, however, in balancing the rights of individuals against the state, and the battles for individual rights will increasingly be fought on virtual shores with technology advancing the ability of individuals to assert themselves and to communicate and proving to be a battleground itself.

Technology gives us cause and opportunity to rethink our social contract and the mechanisms by which we make it real. In the past, we have looked to physical institutions as the methods by which to embody and aggregate government and the services it provides. Our increasing connections through the Internet not only represent new ways to communicate, but also present new opportunities to rebuild those institutions virtually. Thinking about aggregation in this new way also means that a system that works well today can be quickly and dynamically rebuilt as the needs of individuals and society change. Rather than waiting almost six decades as America did for the error of *Plessy* to be corrected, we can harness the power of individuals, to protect our rights *and* to strengthen the social contract from the inside out. For, in the end, individuals are the state.

232. Ronald Reagan, U.S. President, Farewell Address (Jan. 11, 1989), *available at* http://www.americanrhetoric.com/speeches/ronaldreaganfarewelladdress.html (quoting John Winthrop, Gov. Mass. Bay Colony, Model of Christian Charity (1630), *available at* http://religiousfreedom.lib.virginia.edu/sacred/charity.html).

# A FUNDAMENTAL MISCONCEPTION OF SEPARATION OF POWERS: *BOUMEDIENE V. BUSH*

HEATHER P. SCRIBNER*

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## I. INTRODUCTION

Terrorists attacked the United States on September 11, 2001. Congress quickly authorized the President to respond with military force,[1] and the Bush Administration ordered the military detention of alien al Qaeda and Taliban fighters at Guantanamo Bay, Cuba.[2] When the Supreme Court signaled in June 2004 that it would not permit the military to hold these enemy combatants indefinitely,[3] Congress responded with § 7 of the Military Commissions Act (MCA).[4] The MCA deprived the Supreme Court of jurisdiction to hear claims, including habeas corpus petitions, from alien enemy combatants challenging their detention.[5] In *Boumediene v. Bush*,[6] the Supreme Court held that § 7 of the MCA unconstitutionally suspended the writ of habeas corpus and that the detainees thus had access to the federal courts through the writ.[7]

Undoubtedly, civil rights advocates will champion *Boumediene* as a triumph of the Constitution and the rule of law over political will.[8] It is not. It is instead the apex of the Supreme Court's monopoly power over constitutional interpretation. In passing the MCA, Congress challenged the Court's claim to exclusive authority over constitutional meaning. Congress used one of the few tools available under the Constitution to check

1. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

2. Military Order of Nov. 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 9 C.F.R. 918 (2002), *reprinted in* 8 U.S.C. § 801 (2006).

3. *See* Rasul v. Bush, 542 U.S. 466, 483 n.15 (2004) (opining that being detained for over two years in territory controlled by the United States without counsel and without being charged with a crime amounted to unlawful detention).

4. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36 (codified at 28 U.S.C.A. § 2241(e) (Supp. 2009)).

5. *Id.* § 7(a).

6. 128 S. Ct. 2229 (2008).

7. *Id.* at 2275–76.

8. Many already have. *See, e.g.*, Ronald Dworkin, *Why It Was a Great Victory*, N.Y. REV. BOOKS, Aug. 14, 2008, at 18 (praising *Boumediene* as a successful attempt by the Court to prevent the President from escaping his constitutional responsibilities); Jack M. Balkin, *Two Takes: With 'Boumediene,' the Court Reaffirmed a Basic Principle*, U.S. NEWS & WORLD REP., June 19, 2008, http://www.usnews.com/articles/opinion/2008/06/19/two-takes-with-boumediene-the-court-reaffirmed-a-basic-principle.html (arguing that the *Boumediene* Court saw through the Bush "[A]dministration's ruse").

the Supreme Court's usurpation of political power. The Constitution gives Congress authority to make "Exceptions" and "Regulations" to the Court's appellate jurisdiction,[9] and the MCA stripped the Supreme Court of jurisdiction over any and all cases involving the Guantanamo prisoners' detention.[10] Thus, the Court lacked any colorable claim to jurisdiction over any case involving the Guantanamo Bay detainees, and the political branches' constitutional interpretations of the detainees' due process rights should have been final. Nonetheless, without articulating a statute or constitutional provision purportedly granting it jurisdiction, the Supreme Court granted certiorari in *Boumediene v. Bush* and decided the case on the merits.[11] For the first time in American history, the Court had overturned a congressional act limiting its jurisdiction.[12]

*Boumediene* raises vexing questions regarding the limits of judicial review and judicial power. *Boumediene* was a 5–4 decision, with two lengthy and scathing dissents.[13] Yet every member of the Court seemed to agree on one crucial principle: Congress's constitutional check on Supreme Court power is not a plenary, unreviewable one. This Article's thesis is that the Court violated basic separation-of-powers principles when it refused to stay its hand in the face of jurisdiction-stripping legislation.[14] Although the Court has long exercised the power to "say what the law is," it consistently recognized, until *Boumediene*, that it *only* has that power when Congress grants the Court jurisdiction to "apply the rule to particular cases."[15] Only then, "of necessity," can the Court "expound and interpret" the law.[16]

This Article explores the evolution of judicial review into a Supreme Court monopoly over constitutional meaning and the effects of that evolution on separation-of-powers principles.

9. U.S. CONST. art. III, § 2, cl. 2.

10. Military Commissions Act of 2006 § 7(a).

11. Boumediene v. Bush, 128 S. Ct. 2229, 2274–75 (2008).

12. *Id.* at 2275.

13. *Id.* at 2279–93 (Roberts, C.J., dissenting); *id.* at 2293–307 (Scalia, J., dissenting).

14. Others have sharply disagreed. *See* Gerald L. Neuman, *The Extraterritorial Constitution after* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 260–61 (2009) (arguing that the Supreme Court took a "functional approach" in *Boumediene* that balanced practical, historical, and political considerations with the Constitution).

15. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

16. *Id.*

While *Marbury v. Madison* established judicial review soon after this nation's founding,[17] the Judicial Branch continued to respect the separate spheres of constitutional authority committed to the political branches, until the mid-twentieth century. During that time, Congress and the President played leading roles in constitutional interpretation, judicial review was deferential, and the political question doctrine was strong. The Court regularly expressed its own lack of institutional competence to make policy decisions, especially on questions of military policy. The Court consistently opined that the structure and text of the Constitution vests the political branches with exclusive authority to render binding answers to constitutional questions regarding military affairs. This was not a matter of judicial grace. The Constitution itself demanded this division of power between the Judicial and political branches of government. As Chief Justice Marshall acknowledged in *Marbury*, some questions—"[q]uestions, in their nature political"—lie outside the judicial power.[18] This long period of judicial deference to the constitutionally allocated powers of coordinate branches is detailed in Part II.

Part III explores a shift in the Court's focus. Beginning in the 1930s, the Court became more active in defining and protecting individual liberties. From the 1930s to the 1990s, the Court slowly gained confidence and stature. Part III examines several related consequences of the Court's gradual accumulation of power. First, the Court began to deem individual liberties more important than other constitutional values and believed that only the Judicial Branch could protect unpopular groups from the majority. Second, the Court began to claim, then to believe, and finally to convince the nation that the Court had greater constitutional authority than the elected branches to interpret the Constitution. Third, the Court's view of its own competence as a policy-making body changed. Where the early Court doubted its ability to make decisions affecting the whole nation, the modern Court began to believe that it was the only branch of government that could create fair policies. The Court invalidated acts of Congress, which, in its view, took too much power away from the states. The Court reached a new high

17. *See id.* at 177–78 ("It is emphatically the province and duty of the judicial department to say what the law is.").

18. *Id.* at 170.

point in its power in 2000, when it effectively selected George Bush as the forty-third President.[19] Soon thereafter, he faced the security crisis that would define his two presidential terms.

Part IV explores the interbranch struggle over constitutional decision-making authority in connection with security measures following the terrorist attacks of September 11, 2001. The President ordered the military detention of enemy combatants[20] and Congress unambiguously stripped the Court of jurisdiction to hear the detainees' claims.[21] The Court decided them anyway, claiming that Congress violated separation-of-powers standards when it deprived the Court of jurisdiction.[22] The Court has lost its constitutional compass. It was the Court—not Congress—that violated basic separation-of-powers principles when it refused to respect Congress's jurisdiction-stripping legislation.

## II. THE FIRST TWO CENTURIES—A BALANCE OF POWER AMONG COORDINATE BRANCHES

### A. *The Constitutional Structure of Separated Powers*

Our founding generations held the firm conviction that concentrating sovereign power in a single branch of government would invariably harm the people's interests. As James Madison wrote in *The Federalist,* the Founding Fathers considered it an unassailable "political truth" that accumulating political power in a single branch was "the very definition of tyranny."[23] Separation of powers was an "essential precaution in favor of liberty."[24] The Constitution thus divided governmental power among three branches, each with separate spheres of authority.[25]

19. Bush v. Gore, 531 U.S. 98, 109–10 (2000) (per curiam).

20. Military Order of Nov. 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 9 C.F.R. 918 (2002), *reprinted in* 8 U.S.C. § 801 (2006).

21. Military Commissions Act of 2006 § 7(a), 28 U.S.C. § 2241(e)(1) (2006).

22. Boumediene v. Bush, 128 S. Ct. 2229, 2275–76 (2008).

23. THE FEDERALIST NO. 47, at 303 (James Madison) (Isaac Kramnick ed., 1987).

24. *Id.* The Constitution created separate—but not *entirely* separate—spheres of authority in the three branches it established. The Constitution did not divide powers strictly but rather overlapped and comingled powers to create a revolutionary system of checks and balances. One example, especially pertinent here, is the power to wage war. That power was traditionally a function of the Executive Branch alone, but the Framers divided between the Executive and Legislative Branches, in order to better serve the people. *See* discussion *infra* Part II.A.

25. U.S. CONST. arts. I–III.

First was the Legislative Branch. Congress was made most accountable to the people, so it received the greatest quantum of powers, including—but certainly not limited to—the powers to regulate national and international commerce, to tax, to make appropriations, to raise armies, and to declare war.[26] Second was the Executive Branch. Still politically accountable but further removed from the people, the President was vested with the power to execute the nation's laws.[27] The President was also named Commander in Chief of the military[28]—an awesome constitutional responsibility but one necessary to protect the people from threats to national security.

Last, and least powerful, was the Judicial Branch. Subject to congressional approval, the federal courts were authorized to adjudicate certain classes of disputes.[29] As Alexander Hamilton described it in *The Federalist*, the Judiciary would always be the "least dangerous" branch because of "the nature of its functions."[30] He was not being ironic or disingenuous when he wrote those now-famous lines. He had never encountered, and could scarcely fathom, an excessively powerful court.[31] In the Founding Fathers' experience, the courts were weak, and domineering state legislatures often overturned their decisions, leading to unjust results.[32] The Framers believed that the Judicial Branch would require significant protections from political pressure or it would be unable to apply the law fairly.[33] For that reason, the Constitution provided federal judges with life tenure and indiminishable salaries, assuming good behavior.[34]

Madison stressed that despite these vastly different levels of power, each branch was "perfectly co-ordinate," meaning that each possessed equal stature within the constitutional structure.[35] No branch ranked higher than another, and so no branch could "pretend to an exclusive or superior right of

26. *Id.* art. I, § 8.
27. *Id.* art. II, § 1.
28. *Id.* art. II, § 2.
29. *Id.* art. III, § 1.
30. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 23, at 437.
31. Isaac Kramnick, *Editors Introduction* to THE FEDERALIST 11, 24–27 (Isaac Kramnick ed., 1987).
32. *Id.*
33. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 23, at 440–41.
34. *Id.*; U.S. CONST. art. III, § 1.
35. THE FEDERALIST NO. 49 (James Madison), *supra* note 23, at 313.

settling the boundaries between their respective powers."[36] Neither could any branch claim the sole and exclusive right to interpret the Constitution.[37] For Madison, the people were the source of constitutional power, and thus, "the people themselves . . . can alone declare its true meaning."[38] The United States government was the first government founded on an innovative political theory: the people were sovereign and the government was the people's servant.[39] Each branch of that government was given equal stature and equal rank so that no branch would rise to a position of supremacy over the people.[40] Under these guiding principles, the Founding Fathers could not grant any department of government the power to serve as ultimate referee of interbranch conflicts, or else that referee would be the nation's highest authority.[41] They anticipated that, from time to time, one branch would encroach upon powers allocated to another branch or upon the rights and liberties retained by the people.[42] The solution lay in the constitutional structure, which gave the departments of government overlapping restraints on one another's power.[43] As Madison put it, "the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[44]

The Constitution mentions neither the authority to interpret the Constitution nor the power to review the constitutionality of another branch's actions, but the Framers took it for granted that Congress must interpret constitutional meaning in the course of legislating, and that the President was not bound by Congress's determination that the act was constitutional[45]—the President independently interpreted constitutional

36. *Id.*

37. *See id.* (arguing that as coordinate branches, no one branch can set the boundaries of its own, or the others', respective powers).

38. THE FEDERALIST NO. 49 (James Madison), *supra* note 23, at 313.

39. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1435–36 (1987).

40. *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 245–52 (1994) (arguing that no branch can be the constitutional judge of its own power).

41. *Id.*

42. THE FEDERALIST NO. 51 (James Madison), *supra* note 23, at 319.

43. *Id.*

44. *Id.* at 319.

45. LARRY D. KRAMER, THE PEOPLE THEMSELVES 114–27 (2004).

requirements when determining whether to sign or veto an act of Congress.[46] In *Marbury v. Madison,* Chief Justice John Marshall claimed that the Judicial Branch also had the power and duty to interpret the Constitution.[47]

### B. *The Rise of Judicial Review*

The most famous line Chief Justice John Marshall ever penned appears near the end of *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is."[48] According to many decisions issued in modern times, Chief Justice Marshall's statement stands for the proposition that the Court—and no other branch of government—is supreme in the exposition of the Constitution's meaning.[49] But the Chief Justice was making a more modest claim. He was not asserting that the political branches lacked the power of constitutional review but that the Court also had the power to interpret and act on its own interpretation of constitutional text.[50] To be sure, Chief Justice Marshall was seeking far greater power than the Court had ever before enjoyed, but he never claimed that the Court had greater authority than the political branches to interpret the Constitution. And yet, the idea that the Supreme Court alone determines constitutional meaning has now become commonplace among scholars and laypersons alike.[51] Any attempt by the political branches to enforce a contrary reading of the constitutional text is viewed as inviting lawlessness.[52] *Marbury* has been misapplied so often that it is worthwhile to

46. *See id.* at 106 (recounting that Thomas Jefferson was a proponent of the idea that each branch had independent authority to interpret the constitution without reliance upon the other branches' interpretations).

47. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

48. *Id.*

49. *E.g.* Boumediene v. Bush, 128 S. Ct. 2229, 2259 (2008); Cooper v. Aaron, 358 U.S. 1, 18 (1958).

50. KRAMER, *supra* note 45, at 124–27.

51. *Id.* at 220–23. *See generally* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 129 (1999) (opining that many people have "warm and fuzzy feelings about judicial review").

52. *See generally* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation,* 110 HARV. L. REV. 1359, 1377 (1997) ("The reasons for having laws and a constitution that is treated as law are accordingly also reasons for establishing one interpreter's interpretation as authoritative.").

tread again over its familiar ground and place the Court's power to "say what the law is"[53] in its proper context.

*Marbury v. Madison* arose from the first great political crisis following the Constitution's ratification: President John Adams, a Federalist, had been soundly defeated in his run for a second term of office in the presidential election of 1800.[54] Adams was determined to entrench the Federalist Party's influence within the government before Thomas Jefferson, the Republican candidate, took office.[55] To that end, in January of 1801, Adams named Secretary of State John Marshall, a man with no prior judicial experience, to serve as Chief Justice of the Supreme Court.[56] The next month, on February 27, 1801, with less than one week before the end of Adams's term, Congress passed an act creating forty-two justices of the peace for Washington, D.C.[57] On March 2, Adams nominated judges to fill those positions, and the Senate confirmed each nomination on March 3.[58] John Marshall signed the commissions—in his other role as Adams's Secretary of State—and sent his brother, James, to deliver them.[59] The following day, March 4, 1801, President Jefferson took office.[60] James Marshall had not delivered some of the commissions in time—including William Marbury's—and President Jefferson instructed his Secretary of State, James Madison, to withhold the undelivered commissions.[61] Marbury filed suit in the Supreme Court seeking a writ of mandamus, a judicial order compelling Madison to deliver his commission.[62]

Ask any group of law students what *Marbury v. Madison* is about, and they likely will say that it established judicial review—the proposition that the federal Judiciary may review the substance of an act of Congress and determine whether it violates the Constitution.[63] But *Marbury*'s conclusion that the Judiciary could declare a statute unconstitutional was far less

53. *Marbury*, 5 U.S. at 177.
54. William Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 3 (1969).
55. *Id.* at 3–4.
56. *Id.* at 3.
57. *Id.* at 4.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 137 (1803).
63. 16 C.J.S. *Constitutional Law* § 150 (2009).

controversial at the time than the Court's assertion that it could order the President of the United States to install Mr. Marbury in his judicial office.[64] The Jefferson Administration would almost certainly have refused to obey the mandamus, thus undermining the Court's power at the beginning of America's history.[65] Knowing that there was no realistic chance of awarding Marbury his judicial post, the Chief Justice used the occasion to make his case for a significantly stronger Court.

The *Marbury* opinion is filled with majestic, if overly general, language. Chief Justice Marshall said, "The very essence of civil liberty certainly consists in the right of every individual to claim the protections of the laws . . . ."[66] We have a government "of laws, not of men."[67]—in other words, the law binds even the President. But the Chief Justice nonetheless recognized that there is a sphere of activity in the political branches that cannot be questioned by any coordinate branch, and whether the executive action is unreviewable "must always depend on the nature of that act."[68] If the executive officer is acting at the direction of the President, in an area where the Constitution grants the President discretion, then it is a political act unreviewable by the Court.[69] If, on the other hand, a political-branch official fails to perform a ministerial task affecting another's individual rights, then that individual can sue to require its performance.[70] Chief Justice Marshall opined that the Judiciary had the power to issue orders that bound Executive Branch officials to perform these ministerial tasks—tasks that did not involve executive discretion.[71] Always a political mastermind, the Chief Justice announced this principle in a case where the Court did not actually order the Executive Branch to do anything.[72] He gave President Jefferson no opportunity to disobey a court order.

64. Van Alstyne, *supra* note 54, at 4.

65. *Id.* at 11.

66. *Marbury*, 5 U.S. at 163.

67. *Id.*

68. *Id.* at 165.

69. *Id.* at 164.

70. *Id.* at 166.

71. *Id.*

72. *See id.* at 138 (holding that the Supreme Court does not have the power to issue a writ of mandamus to the Secretary of State in its original jurisdiction).

With equal cunning, Chief Justice Marshall established the principle of judicial review in a case that seemingly limited the power of the Judicial Branch. Mr. Marbury filed his mandamus action directly with the Supreme Court; it was not there on appeal.[73] The first question, then, was whether the Court had original jurisdiction over the dispute.[74] According to Chief Justice Marshall, the Judiciary Act of 1789 provided a statutory basis for the Supreme Court to exercise original jurisdiction in cases seeking mandamus.[75] The Chief Justice held, however, that the Constitution permitted the Court to exercise only appellate jurisdiction over such a case.[76] The first Judiciary Act thus attempted to give the Supreme Court more power than Article III permitted.[77] It was therefore "repugnant to the Constitution," and the Supreme Court was required to follow the Constitution rather than the Judiciary Act.[78]

Countless scholars have criticized *Marbury* and the principle of judicial review that it established.[79] Nevertheless, judicial review has become an integral part of America's constitutional culture.[80] It is too late to argue that the Supreme Court may not act on its own interpretations of the Constitution. The timelier question is this: What power do the coordinate branches have to assert and act on their own contrary interpretations of the Constitution?

*Marbury*'s position was that each coordinate branch of the federal government possesses this power.[81] Chief Justice Marshall used *Marbury* as a platform from which to seek greater power for the Court over constitutional interpretation. But he sought to share that power with the political branches, not to monopolize it. He acknowledged that not every substantive provision of the Constitution was open to judicial

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73. *Id.* at 174–76.

74. *Id.* at 174.

75. *Id.*

76. *Id.* at 175–76.

77. *Id.*

78. *Id.* at 176.

79. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 2 (2d ed., Yale University Press 1986) (describing the *Marbury* opinion as "very vulnerable"); Van Alstyne, *supra* note 54, at 38 (arguing that it is surprising anyone could sensibly think that *Marbury* authoritatively established the doctrine of federal substantive judicial supremacy).

80. *See supra* note 51 and accompanying text.

81. *Marbury*, 5 U.S. at 170.

interpretation.[82] Some questions, according to Chief Justice Marshall—"[q]uestions, in their nature political," lay outside the judicial power.[83]

This was not the first time that Chief Justice Marshall opined that the Constitution's separation-of-powers structure limited the Judiciary's role in constitutional interpretation. On March 7, 1800, then-Congressman Marshall gave a speech in the House of Representatives regarding the extradition of a man accused of committing murder aboard a British vessel.[84] The man claimed that he was an American citizen.[85] The federal district court judge before whom the case was pending disagreed; he believed that the man was a British subject named Thomas Nash.[86] Acting under the extradition provisions of the Jay Treaty, President John Adams delivered Nash to the British.[87] A House Resolution rebuked Adams for his action, calling it a "dangerous interference of the Executive with Judicial decisions."[88] But Marshall defended Adams on separation-of-powers grounds. Marshall explained that not every question of constitutional law was for the Judiciary to entertain: "If the Judicial power extended to every question under the Constitution, it would involve almost every subject proper for Legislative discussion and decision . . . ."[89] If this were the case, then there would be no separation of powers: "The division of power . . . could exist no longer, and the other departments would be swallowed up by the Judiciary."[90] Thus, contrary to popular belief, the author of *Marbury* was firmly committed to a limited judicial power.

If any doubts remain about John Marshall's views on judicial supremacy, then his opinion in *McCulloch v. Maryland*[91] should put those doubts to rest. In that case, Congress chartered a national bank to help finance war debts; Maryland imposed a tax on the bank; and the bank refused to pay the tax.[92] Maryland sued the bank to collect the taxes, and, in the course of the

82. *Id.*
83. *Id.*
84. 10 ANNALS OF CONG. 596–618 (1800).
85. *Id.* at 532.
86. *Id.*
87. *Id.* at 532–33.
88. *Id.* at 533.
89. *Id.* at 606.
90. *Id.*
91. 17 U.S. (4 Wheat.) 316 (1819).
92. *Id.* at 401–02.

litigation, Maryland raised a constitutional issue: Had Congress exceeded its Article I powers in creating the bank?[93] The Constitution does not by its terms authorize Congress to establish a bank, nor is a national bank strictly necessary to put any of Congress's enumerated powers into effect.[94] Maryland argued that the Necessary and Proper Clause[95] only allowed Congress to pass laws that were strictly necessary to its enumerated powers,[96] but Chief Justice Marshall took a much broader view of Congress's constitutional authority:

> We admit . . . that the powers of the [federal] government are limited . . . . But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.[97]

Modern students of constitutional law, familiar with the Court's recent claims to monopoly power over constitutional interpretation, may be tempted to read *McCulloch* as saying that the *Court* is not strictly bound by the plain text when it interprets constitutional provisions. But Chief Justice Marshall actually said something quite different. It was not the Court but rather Congress that had wide discretion to interpret ambiguous constitutional provisions, and if the Constitution were open to a range of interpretations, then the Court was bound by Congress's choice within that range.[98]

For Chief Justice Marshall, the Constitution set the limits of congressional power, but it did not "partake of the prolixity of a legal code."[99] It did not describe the limits of congressional

93. *Id.* at 406–07.
94. *Id.* at 407–10.
95. U.S. CONST. art. I, § 8, cl. 18.
96. *McCulloch*, 17 U.S. at 412.
97. *Id.* at 421.
98. *Id.*
99. *Id.* at 407.

power with precision but instead marked only the "great outlines" of that power, which Congress was to interpret in deciding whether or how to exercise its enumerated powers.[100] Congress had wide latitude in delineating those limits.[101] Judicial review consisted of determining whether the legislative ends were "legitimate" and the legislative means "appropriate"[102]—what we now think of as the highly deferential "rational basis scrutiny" of judicial review.[103]

It is important to note that rational basis scrutiny was a judicially crafted tool for enforcing separation of powers, not for enforcing substantive constitutional law.[104] When the Court declared a law "rational," it was not thereby declaring it "constitutional."[105] It was the political branches, not the Court, who determined whether the law was constitutional.[106] The Supreme Court did not offer its own independent judgment as to whether the statute was constitutional; instead, its review was limited to determining whether Congress could have rationally *believed* the statute was constitutional.[107] An imperfect analogy from the criminal law is the "not guilty" verdict. The jury that renders this verdict is not declaring that the defendant did not commit the crime, but rather only that the jury is not convinced beyond a reasonable doubt that the defendant did commit the crime.[108] So too, in exercising rational basis review, the Court that declared a law rational had not determined that the law was constitutional but only that it was not completely unsupportable or wholly beyond the pale.[109]

The Marshall Court recognized that the Constitution was intentionally structured to avoid too great an accumulation of power in any single branch. *Marbury* established the principle of judicial review, and judicial review plays an important role in

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100. *Id.*

101. *Id.* at 421.

102. *Id.*

103. *See generally* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (articulating the standard of rational basis review).

104. KRAMER, *supra* note 45, at 219.

105. *Id.*

106. *Id.*

107. *Id.*

108. Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 76 NOTRE DAME L. REV. 1165, 1182 (2003).

109. KRAMER, *supra* note 45, at 219.

maintaining the delicate balance of power among the coordinate branches. It helps to prevent Congress from imposing unconstitutional laws on the American people. At the same time, the Constitution's text is not precise; it does not "partake of the prolixity of a legal code," and thus it is open to a range of reasonable interpretations.[110] The Marshall Court established that it was for Congress, who was politically accountable to the people, to choose among those reasonable interpretations.[111] Only where Congress had gravely erred in its judgment would the Court intervene.[112] The early Court correctly believed that judicial review is so powerful and so subject to abuse that it demands this type of restraint.

### C. *Early Recognition of the Limits of Judicial Review*

The early Court recognized that if it betrayed separation-of-powers principles through overzealous judicial review, Congress held a constitutional trump card. The Constitution grants Congress plenary power to strip the Court of appellate jurisdiction.[113] The Supreme Court's jurisdiction is subject to "such Exceptions, and under such Regulations as the Congress shall make."[114] The Constitution also leaves to Congress the decision whether to create lower federal courts,[115] which exist only as a matter of legislative grace.[116] Article III identifies certain classes of "Cases" and "Controversies" that fall within the federal "judicial Power"[117] and vests that power in the Supreme Court and whatever lower federal courts Congress may "from time to time ordain and establish."[118] From the beginning, however, neither Congress nor the Court read Article III as

110. McCulloch v. Md., 17 U.S. (4 Wheat.) 316, 407 (1819).

111. *Id.* at 386–87.

112. *Id.*

113. U.S. CONST. art. III, § 2, cl. 2.

114. *Id.* The Constitution does grant the Supreme Court a modest amount of self-executing jurisdiction, where states or foreign ambassadors are parties. *Id.*

115. *Id.* § 1.

116. *See* Lauf v. E. G. Shinner & Co., 303 U.S. 323, 329 (1938) ("There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."); Sheldon v. Sill, 49 U.S. (8 How.) 411, 448–49 (1850) (concluding that "Congress, having the power to establish the [inferior] courts, must define their respective jurisdictions"); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 314–15 (1816) (emphasizing that Congress has an option, not an obligation, to create inferior courts).

117. U.S. CONST. art. III, § 2, cl. 1.

118. *Id.* § 1.

automatically vesting jurisdiction over these cases and controversies in any federal court.[119] Authorizing legislation was necessary, and Congress passed such authorizing legislation during its first term—the Judiciary Act of 1789.[120] This first Judiciary Act provided the federal courts with considerably less than the full amount of judicial power potentially available under the Constitution.[121]

The first important cases that recognized Congress's plenary power over the Court's jurisdiction arose in a legal and factual context highly relevant to *Boumediene*. The question presented was: Does the Constitution grant federal courts self-executing jurisdiction to issue writs of habeas corpus? Article I, Section Nine provides that "[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[122] Does this mean that the federal Judiciary, without statutory authorization from Congress, possesses habeas jurisdiction?

In the 1807 case of *Ex parte Bollman*,[123] Chief Justice John Marshall's answer was "no."[124] *Bollman* involved consolidated habeas petitions by two prisoners, Swartwout and Bollman, convicted of treason against the United States.[125] The first issue was whether the Supreme Court had jurisdiction to issue writs of habeas corpus in their cases.[126] Swartwout's attorney argued that the Court's jurisdiction derived directly from Article III, Section Two, so "[n]o legislative act is necessary to give [habeas] powers to this court."[127] Bollman's attorney, on the other hand, contended that habeas jurisdiction was part of the Court's "inherent powers" and "not given by the constitution, nor by statute, but flow[ing] from the common law."[128] But the Chief

119. *See supra* notes 113–16 and accompanying text.

120. Judiciary Act of 1789, ch. 20, 1 Stat. 73 (codified as amended in scattered sections of 28 U.S.C.). The 1789 Act lends important insights in interpreting Article III because the first Congress was made up of a great majority of the leaders who drafted and voted to ratify the Constitution itself just one year earlier. David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 80 (2009). Thus, their interpretation of Article III's requirements should carry great weight.

121. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 3.3, at 197 (5th ed. 2007).

122. U.S. CONST. art. I, § 9, cl. 2.

123. 8 U.S. (4 Cranch) 75 (1807).

124. *Id.* at 95.

125. *Id.* at 75–76.

126. *Id.* at 77.

127. *Id.*

128. *Id.* at 80.

Justice rejected both these views.[129] Unlike state judiciaries that derive their power from the common law, the federal Judiciary has only the jurisdiction "given by the constitution, or by the laws of the United States. . . . [Federal] courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."[130]

The Chief Justice then determined that Congress had, in fact, granted the Court the power to issue habeas writs in the Judiciary Act of 1789.[131] In *Bollman,* as in *Marbury,* Chief Justice Marshall did not shy away from dicta. He again fought hard for greater power for the Judiciary, contending that Congress must have felt "with peculiar force" their "obligation" to grant the federal courts jurisdiction to issue the writ of habeas corpus—that "great constitutional privilege."[132] But the Chief Justice conceded that if Congress had failed to perform this "obligation," the Court could not enforce it.[133] If Congress had not passed the Judiciary Act granting the Supreme Court habeas jurisdiction, then "the means [would] be not in existence," and so "the privilege [of the writ] itself would be lost."[134]

The Judiciary Act of 1789 did not grant habeas review over all cases and controversies that could come before the Court on appeal.[135] Most notably, the federal courts could not issue habeas writs for state prisoners.[136] Congress did not broaden the federal courts' habeas jurisdiction until the Reconstruction Era, when Southern state authorities began illegally imprisoning freed blacks, and whites sympathetic to Reconstruction efforts.[137] To remedy the situation, Congress passed a new habeas statute to allow federal courts to issue habeas writs where the prisoner

129. *Id.* at 95.

130. *Id.* at 93.

131. *Id.* at 94–95.

132. *Id.* at 95.

133. *Id.*

134. *Id.*

135. *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82 (codified as amended at 28 U.S.C. § 2241 (2006)) ("[W]rits of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.").

136. The Judiciary Act of 1789 permitted the federal courts to issue habeas writs only for prisoners held "in custody, under or by colour of the authority of the United States." *Id.*

137. William Van Alstyne, *A Critical Guide to* Ex parte McCardle, 15 ARIZ. L. REV. 229, 235–36 (1973).

challenged his custody as violating "the constitution, or . . . any treaty or law of the United States."[138] It also allowed for appeal to the Supreme Court from lower federal court decisions on habeas petitions.[139] At the same time, the Reconstruction Congress passed the Military Reconstruction Act, which divided the South into different districts under military command.[140]

This was the way things stood in 1867 when McCardle, the editor of the *Vicksburg Times*, printed several articles criticizing the military occupation of Mississippi.[141] McCardle was arrested under the Military Reconstruction Act for disturbing the peace, inciting insurrection and disorder, libel, and impeding Reconstruction.[142] While held in military custody awaiting trial by military commission, McCardle filed a statutory habeas corpus petition challenging his confinement.[143] With McCardle's petition pending before the Supreme Court, the Reconstruction Congress repealed the Court's jurisdiction to entertain such habeas corpus petitions.[144] Without doubt, Congress sought to achieve a particular substantive result.[145] Congress believed that the Reconstruction Acts were necessary to protect a war-ravaged nation and believed further that the Supreme Court would declare the Reconstruction Acts unconstitutional if given the opportunity.[146]

When his petition reached the Court in *Ex parte McCardle*,[147] the Supreme Court refused to decide it; the Court stated, "The first question necessarily is that of jurisdiction . . . ."[148] Article III allows Congress to make exceptions to the Court's appellate jurisdiction, and Congress had deprived the Court of

138. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385; Van Alstyne, *supra* note 137, at 234.

139. §1, 14 Stat. at 386; Van Alstyne, *supra* note 137, at 235.

140. Act of March 2, 1867, ch. 153, § 1, 14 Stat. 428, 428; Van Alstyne, *supra* note 137, at 236.

141. Van Alstyne, *supra* note 137, at 236.

142. *Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 320–21 (1868).

143. *See* Van Alstyne, *supra* note 137, at 237 (stating that the federal circuit court denied McCardle's habeas petition).

144. Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44, 44.

145. *See* Van Alstyne, *supra* note 137, at 239 (observing that § 2 was passed to "strike at McCardle's pending case").

146. *Id.* at 238.

147. 74 U.S. (7 Wall.) 506 (1868).

148. *Id.* at 512.

jurisdiction, therefore, "it [was] useless, if not improper, to enter into any discussion of other questions."[149]

Although *McCardle* said the Court was "not at liberty to inquire into the motives of the legislature" in withdrawing habeas jurisdiction,[150] the Court did comment on Congress's motives at length less than one year later.[151] The opportunity arose when another military prisoner sought habeas relief in the Supreme Court under a different jurisdictional statute.[152] In *Ex parte Yerger*, the Court noted that Congress had deliberately prevented Supreme Court review of McCardle's habeas petition:

> The effect of the act was to oust the court of its jurisdiction of the particular case then before it on appeal, and it is not to be doubted that such was the effect intended. Nor will it be questioned that legislation of this character is unusual and hardly to be justified except upon some imperious public exigency.
>
> *It was, doubtless, within the constitutional discretion of Congress to determine whether such an exigency existed* . . . .[153]

The Court clearly was not pleased that Congress had repealed its jurisdiction over McCardle's case, but it had sufficient respect for the constitutional separation-of-powers structure to abide by Congress's decision. The Court could "say what the law is"[154] only if Congress granted the Court jurisdiction to resolve a particular case or controversy.[155] Congress's plenary power to regulate federal court jurisdiction was thus an important part of the constitutional scheme of checks and balances, which was intended to maintain an equilibrium of power among the coordinate branches of the federal government. If the Supreme Court were to overstep its proper sphere and misuse its power of judicial review to strike down acts of Congress that did not meet the policy preferences of the Justices, then Congress had the constitutional means to combat the Judiciary's usurpation of political power.

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149. *Id.*

150. *Id.* at 514.

151. *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 104–06 (1869).

152. *Id.*

153. *Id.* at 104 (emphasis added).

154. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

155. *Id.* at 148 ("It is competent for [C]ongress to prescribe the forms of process by which the [S]upreme [C]ourt shall exercise its appellate jurisdiction . . . .").

Congress has very rarely needed to exercise its Exceptions and Regulations check[156] because the Court has historically limited its own jurisdiction through the political question doctrine. The premise behind the classical political question doctrine is that the Judiciary could not resolve certain constitutional questions because the Constitution itself committed them to the political process.[157] Early Supreme Court decisions like *Luther v. Borden*[158] considered the political question doctrine to be a constitutionally mandated principle for enforcing separation of powers.[159] *Luther* arose out of the Dorr rebellion of the 1840s, in which Rhode Island's original charter government refused to recognize a new constitution adopted by a convention of Rhode Island's people.[160] The charter government declared it a crime to hold elections under the new constitution.[161] The people held the elections nonetheless, and the charter government responded by declaring martial law.[162] The sheriff, Borden, broke into Luther's home to search for evidence regarding the prohibited election.[163] Luther sued Borden in federal court for trespass.[164]

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156. U.S. CONST. art. III, § 2, cl. 2.

157. Rachel Barkow has carefully distinguished between the classical and prudential strands of the political question doctrine. Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002). The classical strand of the political question doctrine is premised upon the idea that the Constitution itself forbids the Judiciary from entertaining certain policy questions. *Id.* at 246–53. The prudential strand of the political question doctrine, on the other hand, is more closely related to abstention doctrines. *Id.* at 253–64. In these situations, the Constitution does not forbid judicial review and Congress has granted statutory jurisdiction over the issues presented, but the Court nonetheless declines to adjudicate the case out of deference to the policy-making decisions of the political branches. *Id.* at 263–73. Barkow's article traces how the Court's failure to articulate clearly whether it was relying upon the classical or prudential strand led to a jurisprudential mess, and as a result, too-heavy reliance on the prudential strand has almost killed the constitutionally based classical strand. *Id.* Barkow advocates a return to the classical strand, in which the Judiciary only refrains from hearing cases where the subject matter presents a textually demonstrable commitment of constitutional decision-making authority to a coordinate branch. *Id.* at 319–35. This article focuses on military power, which is the clearest example of the classical political question doctrine, with a plethora of clear textually demonstrable commitments of authority outside the Judicial Branch. Thus, it is largely unnecessary to distinguish here between the classical and prudential strands of the doctrine.

158. 48 U.S. (7 How.) 1 (1849).

159. *Id.* at 46–47.

160. *Id.* at 34–37.

161. *Id.* at 36–38.

162. *Id.* at 37.

163. *Id.* at 34, 37.

164. *Id.* at 34.

Luther's civil rights were clearly at issue since a state official had invaded his home.[165] Luther had standing to assert the common law claim of trespass, but larger political questions were involved as well.[166] In order to decide whether Borden was liable for trespass, the Court would also have been forced to decide whether Luther was involved in a rebellion against the "true" Rhode Island government—giving Borden a defense to Luther's trespass claim—or whether Borden's group had unlawfully declared martial law in order to prevent the "true" state government from taking office.[167] The Supreme Court refused to address those questions, even though Luther's liberty and property rights had been harmed.[168] The Court found that the Constitution's text and separation-of-powers structure demanded that the political branches, not the Court, determine Rhode Island's legitimate government.[169] Article IV provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government,"[170] and the Court interpreted these words as vesting in Congress and the President unreviewable constitutional authority to decide what constituted the lawful government of a state.[171] Even more importantly for our purposes, the Constitution also vests the President with unreviewable power to decide who is an *enemy* of that government:

> [T]he President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it . . . . After the President has acted and called out the militia, is a [federal court] authorized to inquire whether his decision was right? . . . . If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States

165. *Id.*

166. *Id.* at 34–35. The court did not discuss the question of standing but went instead to the political question. *Id.*

167. *Id.* at 38–39.

168. *Id.* at 38–43.

169. *Id.* at 42–43.

170. U.S. CONST. art. IV, § 4.

171. *Luther*, 48 U.S. at 42 ("[T]he right to decide is placed there [in Congress], and not in the courts."); *id.* at 43 ("[T]he power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President.").

> .... If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order.[172]

The Court rejected the notion that the Judiciary must have the power to entertain every case that affects an individual's civil rights:

> It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual.[173]

The *Luther* Court stressed that, in order to execute his constitutional functions, the President must decide what constitutes a rebellion against a state.[174] The President could not be "equally effectual" in performing that constitutional duty if the Judicial Branch could second-guess his decisions and nullify them after the fact.[175] Important civil rights of many individuals would undoubtedly be affected by the President's decision, but the Court emphasized that other constitutional values may take precedence over individual rights, such as the security of the community and the finality of political-branch decisions.[176] In the *Luther* Court's eyes, balancing those factors was a task that the Constitution assigned to Congress and the President.[177] The political branches were accountable to the people at the voting booth, and that political accountability provided "strong safeguards against a willful abuse of power."[178]

During the Civil War era, the Supreme Court repeatedly held that the political branches possessed unreviewable constitutional authority over wartime decision-making. In *The Prize Cases*, the Court explained that the President had constitutional authority

172. *Id.* at 43.

173. *Id.* at 44.

174. *Id. See generally* The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862) (holding that the question whether the President should institute a blockade against southern states was one "to be decided *by him*").

175. *Luther,* 48 U.S. at 44.

176. *See id.* at 44 (admitting that the President's power to recognize lawful state governments may be "dangerous to liberty" but confirming that that power is necessary) (citing Martin v. Mott, 25 U.S. (12 Wheat.) 19, 29–31 (1827)).

177. *Id.* at 42–44.

178. *Id.* at 44.

to decide whether the Southern states had engaged in acts of war against the Union.[179] The Court lacked the power of judicial review over the President's decision:

> Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him,* and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.[180]

The Court further held that the Constitution assigns unreviewable decision-making authority to the political branches regarding how to administer justice to the enemy. In *Ex parte Vallandigham,*[181] the Supreme Court held that it lacked constitutional authority to review any challenge to a sentence imposed upon a member of the enemy's forces by a military commission.[182] But the Court drew a sharp distinction between enemy combatants and civilians. In *Ex parte Milligan,*[183] for example, the Court held that civilians who had not associated with the enemy must be tried in civilian courts so long as those courts were open and functioning.[184]

The jurisprudential contours of the Court's political question doctrine where military affairs were involved began to follow precisely the traditional legal categories of the international customary laws of war. The laws of war recognize that many behaviors considered depraved and criminal under normal circumstances are necessary and even desirable during armed conflict.[185] The most obvious example is the intentional killing of human beings.[186] In times of peace, this action could lead to criminal charges for murder, a criminal trial, and punishment; however, in times of war a soldier may be legally required to use

179. *Prize Cases,* 67 U.S. at 670.

180. *Id.*

181. 68 U.S. (1 Wall.) 243 (1863).

182. *Id.* at 253.

183. 71 U.S. (4 Wall.) 2 (1866).

184. *Id.* at 118–24.

185. Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror,* 153 U. PA. L. REV. 675, 692–95 (2004).

186. *Id.* at 692.

deadly force to incapacitate enemy forces.[187] No criminal charges may be brought against that soldier for that action, either during or after the hostilities.[188] Combatants who are taken prisoner during the conflict may be detained until the armed conflict ceases, but this detention is not intended as punishment.[189] As the Court recently put it, "[t]he purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again . . . . 'Captivity is neither a punishment nor an act of vengeance.'"[190]

The political branches alone were responsible for interpreting and enforcing constitutional due process rights afforded to enemies of the United States; the Judicial Branch exercised the power of judicial review only where the military sought to try civilians who had not associated with the enemy. *Ex parte Quirin*[191] is a key example. A group of eight Nazis, including two American citizens, came to America in 1942 with plans to sabotage American economic and transportation centers.[192] One of the saboteurs informed the FBI of the plot, and the group was arrested.[193] At FDR's instruction, military commissions were established for their trials, and they were sentenced to death.[194] They filed habeas petitions, which the Court refused to entertain because the petitioners' acts "constitute[d] an offense against the law of war which the Constitution authorizes to be tried by military commission."[195]

187. *Id.*

188. This is an overgeneralization. More accurately, military personnel may not be prosecuted for wartime activities taken in accordance with the laws of war; unnecessary violence and depraved acts against the enemy's combatants or civilians are punishable as war crimes. Brooks, *supra* note 185, at 693. Much has been written about whether al Qaeda's and the Taliban's actions against the U.S. should be treated as acts of war, criminal acts, or war crimes. *See* John C. Yoo and James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207 (2003) (discussing the legal status of terrorists). This Article is concerned with a narrower question: Which governmental branch or branches have constitutional authority to determine the level of process these combatants are due?

189. *See* Brooks, *supra* note 185, at 692 (arguing both that opposing forces may be detained and that opposing forces may not be punished for their wartime behavior).

190. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion) (quoting W. WINTHROP, MILITARY LAW AND PRECEDENTS 788 (rev. 2d ed. 1920)).

191. 317 U.S. 1 (1942).

192. *Id.* at 20–22.

193. G. Edward White, *Felix Frankfurter's 'Soliloquy' in* Ex Parte *Quirin*, 5 GREEN BAG 423, 425 (2002).

194. *Id.* at 425–26.

195. *Quirin*, 317 U.S. at 46.

The laws of war, almost by definition, apply only during times of war and only to acts of war.[196] Other bodies of law apply in other circumstances. The applicability of the laws of war thus turned on a series of binary distinctions: Was the nation in a time of peace or a time of war?[197] Did the act constitute a crime or a matter of national security?[198] Domestic versus foreign?[199] Civilian versus combatant?[200] The Court has exercised judicial review only where the laws of war were not implicated. For example, in *Reid v. Covert*,[201] the wives of U.S. servicemen stationed abroad were tried for murder by court martial, without Fifth and Sixth Amendment protections.[202] These were crimes, not matters of national security, and civilians, not military personnel, committed the crimes.[203] Thus, the laws of war were inapplicable, and the Court granted their habeas petitions and held that U.S. civilians had a constitutional right to a jury trial.[204]

But where the laws of war applied, all constitutional decision-making was left to the political branches alone.[205] In *Johnson v. Eisentrager*,[206] the petitioners were German nationals who continued military pursuits on Japan's behalf after Germany's surrender in World War II.[207] A United States military commission convicted them of war crimes, and they were returned to occupied Germany to serve their sentences in an American military prison.[208] The *Eisentrager* Court refused to entertain their habeas petitions, recognizing that national

196. Brooks, *supra* note 185, at 692.
197. *Id.* at 677.
198. *Id.*
199. *Id.*
200. *Id.*
201. 354 U.S. 1 (1957).
202. *Id.* at 3–5.
203. *Id.* at 19–20.
204. *Id.* at 5.
205. *See In re* Yamashita, 327 U.S. 1 (1946). There, General MacArthur ordered trial by military commission of the Japanese commander, who had allowed his troops to brutalize civilians in the Philippines. *Id.* at 1. The trial took place on U.S. territory in the Philippines. *Id.* at 5. The commander sought a writ of habeas corpus in the Supreme Court, and the Court had statutory jurisdiction to issue the writ but nonetheless refused on separation-of-powers grounds. *Id.* at 5–6. The Court followed the traditional rule that the President had unreviewable constitutional authority to establish the procedural rules for military commissions. *Id.* at 9–14.
206. 339 U.S. 763 (1950).
207. *Id.* at 765–66.
208. *Id.* at 766.

security would be compromised if such a broad right to habeas relief were recognized:

> Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.[209]

The *Eisentrager* Court characterized its refusal to entertain the prisoners' habeas petitions as jurisdictional and constitutional—reviewing the political branches' wartime decisions lay outside the constitutional bounds of the judicial power.[210] *Eisentrager* thus followed a long line of precedent, unbroken from the nation's founding through the Second World War, where the Supreme Court maintained a sharp distinction between civilian and military matters. Constitutional separation-of-powers principles might permit judicial review over the former, but the latter were political questions entrusted to the political branches alone. As the next Part details, however, the Court had already begun to engage in more aggressive judicial review in civilian matters, and would soon claim that the Court alone held final interpretive authority over the Constitution.

## III. RECENT HISTORY—THE ASCENSION TO JUDICIAL SUPREMACY

### A. *The Decline of Deference to Political-Branch Judgment*

The first sustained period of judicial non-deference to Congress's constitutional judgments over domestic affairs was the *Lochner* era, when a politically conservative Court struck

209. *Id.* at 779.
210. *Id.* at 765.

down various New Deal statutes for violating individual economic liberties.[211] The Court's newly minted theory of "substantive due process" thwarted the will of the majority of the American people, who strongly supported the New Deal.[212] President Franklin D. Roosevelt responded with his threat to pack the Court with supporters of his administration's progressive agenda.[213]

The seeds of the Court's claim to final interpretive authority over the Constitution were planted, ironically enough, during this time when the Court was at its weakest.[214] In danger of losing its clout to an overwhelmingly popular President, the Court accepted a forced compromise with the two political branches.[215] The Court would not interfere with Congress's and the President's exercise of their enumerated constitutional powers, particularly in the spheres of social and economic legislation.[216] But the Court would play a more active role in defining and enforcing the individual rights articulated in the Bill of Rights and the Reconstruction Amendments.[217] The terms of the compromise were articulated in the famous *Carolene Products* footnote four.[218] More searching judicial review was appropriate, Justice Stone wrote, where specific constitutional protections of individual rights were at issue, where the political process itself was malfunctioning, or where the rights of "discrete and insular minorities" lacking political power were involved.[219]

The *Carolene Products* compromise allowed the Judicial Branch considerably greater power than the Marshall Court had exercised, but the working relationship among the coordinate

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211. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1391 (2001) (opining that the "real furor over the courts began in the 1890s and lasted until at least the middle of the 1920s").

212. *Id.* at 1428–47.

213. KRAMER, *supra* note 45, at 219–26.

214. *Id.*

215. *Id.*

216. United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4; *see, e.g.*, NLRB v. Jones & Laughlin Steel, 301 U.S. 1, 30–31 (1937) (noting that the cardinal principal of statutory construction is to save rather than destroy, United States v. Darby, 312 U.S. 100, 115 (1941) (stating that regulations of commerce not infringing some constitutional prohibition are within the plenary power of Congress).

217. *Carolene Prods.*, 304 U.S. at 152–53 n.4.

218. *Id.*

219. *Id. See* William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 179 (2001) (outlining the New Dealer "preferred position" idea from *Carolene Products* footnote four).

branches still served the Constitution's most essential goal—dispersing sovereign power among three separate branches.[220] No single branch accumulated a dangerous level of sovereign power. Each continued to play a meaningful role in interpreting the Constitution. They had agreed upon separate, relatively well-defined areas of constitutional "turf," and where interpretive questions arose, the coordinate branches would generally defer to the interpretation of the branch within whose turf the issue lay.

Over the next several decades, the Court became increasingly activist, regularly striking down federal legislation, but it continued largely to abide by the *Carolene Products* compromise.[221] The Court played virtually no role in policing legislation Congress passed under its Article I powers. At the same time, the Court vastly increased its own sphere of authority by expanding the number and scope of individual rights as it changed the national landscape with its decisions on desegregation,[222] gender discrimination,[223] abortion,[224] and the rights of criminal defendants,[225] to name but a few.

The most important of these decisions was *Brown v. Board of Education*, which declared racial segregation in public schools unconstitutional.[226] *Brown* was, without doubt, the morally correct decision, and many commentators with radically divergent political views have argued that it was a legally correct decision as well.[227] The Fourteenth Amendment, which

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220. THE FEDERALIST No. 49 (James Madison), *supra* note 23, at 313.

221. KRAMER, *supra* note 45, at 219–21.

222. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (holding that the District of Columbia segregated school system violated the Fifth Amendment's Due Process Clause); Brown v. Board of Education, 347 U.S. 483, 495 (1954) (holding that state segregated school systems violated the Fourteenth Amendment's Equal Protection Clause).

223. *See* Craig v. Boren, 429 U.S. 190, 210 (1976) (holding that an Oklahoma law that mandated a higher drinking age for males than for females violated the Fourteenth Amendment's Equal Protection Clause).

224. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that there is a constitutional right to privacy which covers abortion).

225. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding that the state "may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the [Fifth Amendment's] privilege against self-incrimination").

226. *Brown*, 347 U.S. at 495.

227. *See, e.g.*, Robert H. Bork, *The Judge's Role in Law and Culture*, 1 AVE MARIA L. REV. 19, 20–21 (2003) (opining that the end of legally required racial segregation in *Brown* was "correct both legally and morally"); Cass R. Sunstein, *In Defense of Liberal Education*,

guarantees equal protection of the laws,[228] reflects the fundamental truth that all people are created equal, and the vast majority of the American people at the time recognized that legally enforced racial separation was inherently unequal.[229] The American people wanted to end segregation, but their elected representatives in Congress could not end it because the democratic process had broken down.[230] Congress operated on the basis of seniority, and many Southern political leaders had been in Congress for a very long time.[231] Southern leaders held disproportionate political power, and they were determined to prevent the passage of anti-discrimination legislation.[232] In *Brown*, the Court stretched its constitutional authority so that the national consensus could prevail over an excessively powerful regional minority.[233]

The decision enjoyed wide support from President Eisenhower, the vast majority of congressmen, and the American people.[234] Nonetheless, a small but vocal group of Southern political leaders refused to desegregate. Lower federal courts had ordered the desegregation of schools in Little Rock, but Arkansas Governor Orval Faubus claimed that he was not bound to follow the Supreme Court's interpretation of the Constitution.[235] It was in this context that the Supreme Court

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43 J. LEGAL EDUC. 22, 23 (1993) ("[A]ny serious theory of constitutional interpretation must be able to explain why *Brown* was right.").

228. U.S. CONST. amend. XIV, § 1.

229. *See* TUSHNET, *supra* note 51, at 145 (arguing that the Court's decision in *Brown* was consistent with the views of the national majority).

230. *See id.* (arguing that "Congress could not act").

231. *Id.*

232. *Id.*

233. *Id.*

234. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part 5*, 112 YALE L.J. 153, 186–87 (2002). In the wake of *Brown*, President Eisenhower ordered that Washington, D.C. integrate its public schools and serve as a model for the rest of the nation. DAVID R. GOLDFIELD, BLACK, WHITE, AND SOUTHERN: RACE RELATIONS AND SOUTHERN CULTURE 1940 TO THE PRESENT 78 (1990). President Eisenhower also presented to Congress the first significant civil rights acts passed since the Reconstruction Era, and he signed them into law. JAMES L. SUNDQUIST, POLITICS AND POLICY: THE EISENHOWER, KENNEDY, AND JOHNSON YEARS 238 (2d ed. 1968). All three federal branches were acting in concert toward the same goal of ending racial discrimination. It is all too common that commentators overestimate the Supreme Court's role in desegregation and underestimate the role played by the coordinate branches and the American people. KRAMER, *supra* note 45, at 229; *see* LINO GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS 46 (1976) (arguing that *Brown* was not effective until Congress enacted the Civil Rights Act of 1964).

235. TUSHNET, *supra* note 51, at 7–8.

first claimed final interpretive authority over the Constitution. In a well-known phrase from *Cooper v. Aaron*, a unanimous Court asserted that *Marbury* had "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution" and this principle "has ever since been respected by this Court and the Country as a permanent and indispensible feature of our constitutional system."[236]

*Marbury* said no such thing, of course. *Marbury* claimed that the federal Judiciary's power to interpret the Constitution was equal to that of Congress and the President.[237] *Cooper v. Aaron*, in contrast, did not concern the power of either Congress or the President to interpret constitutional provisions.[238] Instead, it involved the balance of power between the state and federal governments, holding that state governors were bound to enforce federal court orders on desegregation.[239]

*Cooper* had no immediate effect on the balance of power among the federal branches of government; after *Cooper*, the Court continued to acknowledge that Congress had wide discretion in defining the individual rights secured by the Reconstruction Amendments. A key example is *Katzenbach v. Morgan*,[240] which involved a constitutional challenge to the Voting Rights Act of 1965.[241] Among other things, the Voting Rights Act prohibited states from using literacy tests as a condition for voting in state elections.[242] New York state law required that voters be able to read and write in English, and the Supreme Court had previously upheld English literacy requirements from an equal protection challenge.[243] New York argued that Congress had exceeded its power under Section Five of the Fourteenth Amendment when it prohibited the enforcement of those literacy requirements.[244] Section Five gives Congress the power to "enforce" the Fourteenth Amendment "by appropriate legislation,"[245] but the Supreme Court had never

236. Cooper v. Aaron, 358 U.S. 1, 18 (1958).
237. *See supra* notes 81–83 and accompanying text.
238. *Cooper*, 358 U.S. at 14–19.
239. *Id.* at 18–20.
240. 384 U.S. 641 (1966).
241. *Id.* at 643.
242. Voting Rights Act of 1965 § 4(e), 42 U.S.C. § 1973b(e) (2006).
243. Lassiter v. Northampton County Bd. of Election, 360 U.S. 45, 54 (1959).
244. *Katzenbach*, 384 U.S. at 648.
245. U.S. CONST. amend. XIV, § 5.

decided that an English literacy requirement violated the Equal Protection Clause and had indeed previously upheld literacy requirements.[246]

The Court rejected the State's argument soundly, emphasizing that Congress held independent constitutional authority to interpret the Fourteenth Amendment and to legislate in furtherance of its own interpretations—the "sponsors and supporters of the [Fourteenth] Amendment were primarily interested in augmenting the power of Congress, rather than the judiciary."[247] It was immaterial that the Court had previously upheld literacy tests against equal protection challenges; the relevant question was not whether the Judiciary would independently have declared New York's literacy requirements unconstitutional but whether Congress had the power to do so.[248] Congress's powers under Section Five, the Court held, were "the same broad powers expressed in the Necessary and Proper Clause."[249] Further, the Court continued:

> [T]he *McCulloch v. Maryland* standard is the measure of what constitutes 'appropriate legislation' under Section Five of the Fourteenth Amendment. Correctly viewed, Section Five is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.[250]

In sum, *Cooper v. Aaron*'s claim to a judicial monopoly over constitutional interpretation was a dictum and a fiction, and *Katzenbach v. Morgan* later expressly acknowledged that Congress was vested with constitutional authority and broad discretion to more specifically define ambiguous phrasings in the constitutional text.[251] The Court shared with the political

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246. *Lassiter*, 360 U.S. at 54; *Cf.* Guinn v. United States, 238 US. 347, 366 (1915) (upholding the use of a literacy test in itself but also holding that such a test was made invalid by the use of a grandfather clause that absolved a person of a certain age and his linear descendants from the test).

247. *Katzenbach*, 384 U.S. at 648 n.7.

248. *See id.* at 649–51 (stating that the Court's "task is limited to determining whether such legislation is, as required by [Section Five], appropriate legislation to enforce the Equal Protection Clause" and whether the means employed by Congress satisfy the standard of McCulloch v. Md., 17 U.S. (4 Wheat.) 316 (1819)).

249. *Id.*

250. *Id.* at 651.

251. *Id.* at 650–51.

branches the task of defining constitutional rights. And yet, *Cooper*'s bare claim to judicial supremacy seemed to embolden the Supreme Court. Soon after *Cooper*, the Court began to whittle down the political branches' interpretive authority. It began by limiting the political question doctrine.

### B. *The Decline of the Political Question Doctrine*

The Court's restrictions on the political question doctrine began innocently enough. In *Baker v. Carr*,[252] the Court was called on to solve a problem that the political process was incapable of resolving because the problem was a breakdown in the democratic process itself. Congressional districts in Tennessee had become seriously malapportioned.[253] The populations of urban areas had grown quickly, but district lines had not been redrawn to account for the growth.[254] As a result, rural areas were substantially overrepresented and had disproportionately greater political power.[255] Rural politicians were unwilling to reconfigure their districts to ensure fairer representation because their interests lay in maintaining their constituents' greater power—not to mention their own jobs.[256] Justice Brennan, writing for the Court, departed from prior precedent holding that the drawing of political districts presented a nonjusticiable political question.[257]

*Baker* contained an extended discussion of political question cases to that date.[258] It synthesized the cases to identify six factors, weighted on a case-by-case basis, which would determine whether the political question doctrine applied:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate

252. 369 U.S. 186 (1962).

253. *See id.* at 192–94 (reiterating the complaint's charge that Tennessee had reacted to rapid population growth by "arbitrarily and capriciously" apportioning representatives by using a statutory framework that had not been updated in sixty years).

254. *Id.*

255. *Id.* at 256 (Clark, J., concurring).

256. *See* Note, *An Interstate Perspective on Political Gerrymandering*, 119 HARV. L. REV. 1576, 1584 (2006) (noting that before the Court's reapportionment cases, rural legislators in many states blocked reapportionment efforts out of a desire to maintain their own jobs).

257. Baker v. Carr, 369 U.S. 186, 209 (1962).

258. *Id.* at 210–16.

> political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[259]

The touchstone of the political question doctrine was the constitutional separation-of-powers structure.[260] Justice Brennan pointed to the political branches' primary role in foreign policy and foreign relations as the paradigmatic political question.[261] If foreign policy matters are at the core of the political question doctrine, then wartime military decisions—by far the most sensitive and perilous of foreign policy matters—must lie at the very heart of that core.

The facts, issues, and outcome in *Baker v. Carr* fit neatly within the *Carolene Products* compromise. *Carolene Products* footnote four articulated an enhanced role for the Judiciary where the political process itself was not reasonably democratic,[262] and *Baker v. Carr* announced the one-person-one-vote rule, which opened the door for popular majorities to have a greater voice in government through more equitable representation.[263] As President Kennedy put it, "'Quite obviously the right to fair representation, that each vote count equally is, . . . basic to the successful operation of a democracy.'"[264] But the reasoning and broad dicta in *Baker v. Carr* built on the judicial supremacy rhetoric from *Cooper v. Aaron*.[265] Because *Baker v. Carr*'s outcome enjoyed broad popular support, the Court did not lose much political capital by once again declaring itself the "ultimate

259. *Id.* at 217.
260. *Id.* at 210–11.
261. *Id.* at 210–12.
262. United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4.
263. *Baker*, 69 U.S. at 244–50.
264. Friedman, *supra* note 234, at 208 (citing Alexander M. Bickel, *Reapportionment and Liberal Myths*, 35 COMMENT. 483, 487 (1963)).
265. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

interpreter of the Constitution."[266] But in claiming judicial supremacy, *Baker v. Carr* turned the basic premise of the political question doctrine on its head.

The idea behind the classical political question doctrine is that the Constitution itself vests final interpretive authority over some constitutional provisions outside the Judiciary.[267] Unavoidably, the Court must engage in constitutional interpretation to decide, as a threshold matter, whether a particular constitutional provision has been committed to the exclusive interpretive discretion of a coordinate branch. The Constitution does not expressly mention judicial review, so the Constitution naturally does not explicitly forbid judicial review over a smaller subset of political branch decisions. The Court thus has no choice but to engage in constitutional interpretation, determining whether judicial review is permitted from the relevant constitutional text, the text's location within the overall constitutional structure, and its historical usage. But once the Court determines that a political question is presented, the Court's involvement in the matter must end.

In *Baker v. Carr*, however, Justice Brennan asserted that the Court's role in applying the political question doctrine is not only to decide whether "a matter has in any measure been committed by the Constitution to another branch of government" but also to decide whether the political branch has "*exceed[ed] whatever authority has been committed*" in the Court's role as "ultimate interpreter of the Constitution."[268] Under this formulation, the political question doctrine is nearly meaningless. The whole point of the political question doctrine is to vest the final word on constitutional meaning outside the Judiciary in certain cases. The doctrine protects constitutional separation-of-powers principles by ensuring that the awesome power of constitutional interpretation remains dispersed among all branches, rather than concentrated within the Judicial Branch alone. If the Court always serves as the "ultimate interpreter"[269] that determines whether another branch has exceeded constitutional bounds, then there could never be any

266. *Baker*, 369 U.S. at 211.
267. Barkow, *supra* note 157, at 246–53.
268. *Baker*, 369 U.S. at 211 (emphasis added).
269. *Id.*

circumstance under which a coordinate branch has sole interpretive power over a constitutional provision.

Even though the political question doctrine was clearly in decline, the Court continued to treat military matters differently than other constitutional questions. For example, in *Gilligan v. Morgan*,[270] decided more than a decade after *Baker v. Carr*, Kent State students alleged that protesters were killed due to negligent training by the National Guard.[271] The Court dismissed the suit on the grounds that Article I, Section Eight, Clause Sixteen vests in Congress the "'responsibility for organizing, arming, and disciplining the Militia.'"[272] Because training military forces required "complex, subtle, and professional decisions" by military leaders, it was subject "to civilian control of the Legislative and Executive Branches."[273]

### C. *The Rehnquist Era and the End of Deference*

By the time William Rehnquist became Chief Justice, the Court's operating assumption was that the Constitution created a hierarchical, as opposed to a coordinate, power structure.[274] The political branches could interpret the Constitution in the first instance while exercising their delegated powers to make and execute federal law.[275] But the political branches' judgments about the scope of constitutional rights and privileges could never be final.[276] The Court was firmly convinced that it alone could give an authoritative interpretation of constitutional text.[277] The Court's self-perception was incompatible with the fundamental premise of the classical political question doctrine, which posits that the Constitution itself commits some constitutional questions to a coordinate branch outside the judiciary.[278]

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270. 413 U.S. 1 (1973).

271. *Id.* at 3.

272. *Id.* at 6 (quoting U.S. CONST. art. I, § 8, cl. 16).

273. *Id.* at 10.

274. Barkow, *supra* note 157, at 241.

275. *See id.* at 320 (arguing that the Constitution's structure requires political actors "to decide constitutional questions in many instances").

276. *See id.* at 317 ("[T]he Court no longer seems interested in analyzing as a threshold matter whether the Constitution gives an interpretive role to another branch.").

277. *See id.* (concluding that the Rehnquist court did not trust the political branches to make constitutional determinations).

278. *Id.*

Consider Chief Justice Rehnquist's majority opinion in *Nixon v. United States.*[279] Walter Nixon was a crook[280]—a federal judge convicted of making false statements before a grand jury investigating him for accepting a bribe.[281] Nixon nonetheless refused to resign from the bench, so he continued to collect his indiminishable judicial salary.[282] Congress was forced to initiate impeachment proceedings.[283] Under the Senate's rules for impeachments, a committee heard evidence and made a recommendation to the full Senate, which voted to impeach.[284] Nixon sued, alleging that this process violated his constitutional rights.[285] Article I, Section Five, Clause Six provides that the "Senate shall have the sole Power to try all Impeachments."[286] Nixon argued that this provision required a trial before the whole Senate, and not by committee.[287]

Chief Justice Rehnquist eventually pronounced the issue nonjusticiable[288] but only after independently reviewing the merits of Nixon's claims by looking to the dictionary and to history to define for himself the meaning of the terms "try" and "trial."[289] The classical political question doctrine would dictate that the Court should look only to the constitutional text and structure—perhaps aided by history—to determine whether the Constitution vests in the Senate the final power to determine the constitutional requirements of an impeachment trial. The *Nixon* Court's conception of the political question doctrine required no deference to the Senate's judgments at all. *Nixon* merely confirmed that the Court agreed with the Senate's interpretation of the constitutional text.

While *Cooper v. Aaron* and *Baker v. Carr* had pronounced the Court the supreme interpreter of the Constitution, the Court had nonetheless remained true to the *Carolene Products*

279. 506 U.S. 224, 226–38 (1993).

280. TUSHNET, *supra* note 51, at 104. I wish the pun were mine. I lifted it from Mark Tushnet's book.

281. *Nixon,* 506 U.S. at 226.

282. *Id.*

283. *Id.*

284. *Id.* at 227–28.

285. *See id.* at 228 (stating that Nixon alleged that the Senate's impeachment process violated the Article I grant of power to the Senate to try impeachments).

286. U.S. CONST. art. I, § 3, cl. 6.

287. *Nixon,* 506 U.S. at 229.

288. *Id.* at 238.

289. *Id.* at 229–38.

compromise—the Warren Court was undoubtedly activist, but its activism was not directed at the coordinate branches of the federal government. Instead, that Court gave substance to constitutional provisions guaranteeing individual civil rights, while giving wide berth to Congress's and the President's judgments regarding the limits of their own constitutional powers. In the Rehnquist Court, however, the *Carolene Products* compromise fell by the wayside. That division of authority was no longer consistent with the Court's self-image as the supreme interpreter of constitutional meaning. Thus, the Court began to police the limits of Congress's enumerated powers. For the first time in six decades, the Court began to strike down legislation passed under Congress's Commerce Clause power, even though it ostensibly continued to apply only rational basis review.[290]

The Rehnquist Court also struck down legislation Congress passed under Section Five of the Fourteenth Amendment. In the 1960s, in *Katzenbach v. Morgan*, the Court had expressly held that Section Five vested Congress with the same broad authority to legislate under the Fourteenth Amendment as under its Article I powers.[291] But in the 1997 case of *City of Boerne v. Flores*,[292] the Court did an about face, restricting Congress's role to remedying Fourteenth Amendment violations previously recognized by the Court.[293] The Court claimed that it alone had absolute interpretive authority over the rights guaranteed by the Fourteenth Amendment[294] and that Section Five did not permit Congress to define, expand, or create different rights.[295]

The controversy began when the Supreme Court unexpectedly changed in its interpretation of the First

290. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 619 (2000) (striking down the Violence Against Women Act of 1994); Printz v. United States, 521 U.S. 898, 935 (1997) (striking down portions of the Brady Handgun Violence Prevention Act); United States v. Lopez, 514 U.S. 549, 551 (1995) (holding that the Gun-Free School Zones Act of 1990 exceeds Congress's Commerce Clause power); *see also Morrison*, 529 U.S. at 617 n.7 (claiming that "since *Marbury* this Court has remained the ultimate expositor of the constitutional text").

291. Katzenbach v. Morgan, 384 U.S. 641, 650–51 (1966).

292. 521 U.S. 507 (1997).

293. *See id.* at 519 (holding that the Fourteenth Amendment's design and text "are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States").

294. *See id.* at 536 (stressing that the Supreme Court has the power to determine if Congress has exceeded its power under the Fourteenth Amendment).

295. *See id.* at 529 (explaining that Congress cannot alter the Fourteenth Amendment's meaning).

Amendment's Free Exercise Clause in the 1990 decision, *Employment Division, Department of Human Resources of Oregon v. Smith.*[296] An Oregon statute prohibited the use of peyote, and an Indian tribe challenged the statute as infringing upon the free exercise of its religious rituals, which required the use of peyote.[297] Under prior Supreme Court precedent, Oregon's law burdening religious freedoms would have been upheld only if the law was necessary to achieve a compelling governmental purpose.[298] *Smith* held, however, that Oregon's law did not violate the Free Exercise Clause because it was a "neutral law of general applicability."[299] Congress passed the Religious Freedom Restoration Act (RFRA)[300] under its Section Five power specifically to overrule *Smith.*[301]

The Court, viewing itself as the highest constitutional authority, was no longer willing to allow Congress to define constitutional rights.[302] In *City of Boerne v. Flores,* the Court held that Congress lacked constitutional authority to enact RFRA.[303] Congress's power under Section Five, the Court opined, was limited to preventing or remedying acts that the Court had previously recognized as violating the Fourteenth Amendment.[304] The *Boerne* Court cited *Marbury v. Madison* for the proposition that only the Court has the power to give a definitive interpretation of the Constitution.[305] Otherwise, Justice Kennedy wrote, "it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process

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296. 494 U.S. 872, 884–85 (1990).

297. *Id.* at 874–75.

298. *See id.* at 883 (stating that the Indian tribe urged the Court to hold that all "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest").

299. *Id.* at 879.

300. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2006), *invalidated by* City of Boerne v. Flores, 521 U.S. 536 (1997).

301. *Boerne,* 521 U.S. at 512.

302. *See id.* at 529 ("If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'") (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

303. *Id.* at 536.

304. *See id.* at 519 (holding that the Fourteenth Amendment's design and text "are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States").

305. *Id.* at 529.

contained in Article V."[306] *Boerne*'s claim to judicial supremacy in constitutional interpretation garnered the support of the full Court. *Boerne* had three dissenters, and they did not disagree with Justice Kennedy's interpretation of Section Five.[307]

Under the banner of states' rights and federalism, *Boerne* struck down important civil rights legislation and, in the process, undermined long-established principles of separation of powers among the coordinate branches of the federal government.[308] The Marshall Court recognized that the Constitution divided sovereign power among three branches of government to prevent the dangerous accumulation of power in a single branch.[309] *Marbury* claimed for the Court the awesome power to declare unconstitutional a law duly enacted by the people's elected representatives,[310] but the early Court opined that it would only use that power in a very clear case.[311] The Constitution defined the broad outlines of Congress's power, and the Court exercised real restraint when asked to determine whether Congress exceeded its delegated authority.[312] The early Court believed that the democratic process would constrain the political branches from exceeding constitutional limits on their authority. The Rehnquist Court, in contrast, showed remarkably little trust in or respect for the democratic process. There is no reason to doubt Justice Kennedy's sincerity when he wrote in *Boerne* that it was "difficult to conceive of a principle that would limit congressional power" if the Court were not ready to strike down any statute that exceeded the limits of Congress's power, as the Court defined those limits.[313]

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306. *Id.* (citation omitted).

307. *Id.* at 546 (O'Connor, J., dissenting); *id.* at 565–66 (Souter, J., dissenting); *id.* at 566 (Breyer, J., dissenting). The Rehnquist Court also began to pronounce bright-line rules with no basis in constitutional text, structure, or history. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 56–57 (1991) (holding that the Fourth Amendment requires that a criminal defendant be brought before a judge within 48 hours of arrest for a probable cause determination).

308. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001) ("*Boerne* also confirmed . . . that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees.").

309. *See supra* Part II.B–C.

310. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

311. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 395 (1798) ("[I]f I ever exercise [judicial review], I will not decide any law to be void, but in a very clear case.").

312. McCulloch v. Md., 17 U.S. (4 Wheat.) 316, 405–06 (1819).

313. *Boerne,* 521 U.S. at 529. Indeed, the Court has even struck down congressional legislation without identifying the constitutional limits of Congress's power. *See* United States v. Lopez, 514 U.S. 549, 566 (1995) (striking down the legislation passed under

Three years after *Boerne*, the Court dealt the political process an even more severe blow. It decided perhaps the most political of all political questions confronting the nation at the turn of the century—the 2000 presidential race between George W. Bush and Al Gore. Many viewed *Bush v. Gore*[314] as a partisan decision with the five politically conservative members of the Court taking the opportunity to select a Republican President without interference from the nation.[315] The likely truth is more subtle, but ultimately more destructive of democratic ideals. Five members of the Supreme Court selected Bush as the President because they believed the Court was more competent than Congress to decide important political questions.[316]

The presidential race of 2000 was an exceptionally close one. Whoever won Florida's electoral votes would become the forty-third President. On the day after the election, November 8, 2000, George Bush was the frontrunner by 1,784 votes[317] — a margin that, under state law, required a machine recount of the votes.[318] After the recount, a few completed hand counts, and the addition of late-arriving overseas ballots, Bush's lead was 930 votes.[319] At Gore's request, the Florida Supreme Court ordered a hand recount of all votes in four counties and Bush sought a writ of certiorari in the U.S. Supreme Court to prevent the hand recount.[320] Among other issues, Bush raised a question under Article II of the U.S. Constitution.[321]

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Congress's Commerce Clause power despite "legal uncertainty" about the limits of that power).

314. 531 U.S. 98.

315. *See* ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000, at 3–4 (2001) (proposing that the five more conservative justices decided the case at least partly based on political affiliation).

316. A very well-respected federal judge has actually stated that Congress was "not a competent forum" for resolving the election controversy. RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 145 (2001).

317. Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 73 (2000) (per curiam).

318. *Id.*

319. Richard A. Posner, *The 2000 Presidential Election: A Statistical and Legal Analysis*, 12 SUP. CT. ECON. REV. 1, 1 (2004). It came to light in the meantime that more than 19,000 Palm Beach County voters had recorded two different votes. Edmund S. Saver, *"Arbitrary and Disparate" Obstacles to Democracy: The Equal Protection Implications of* Bush v. Gore *on Election Administration*, 19 J.L. & POL. 299, 325 (2003). For an additional treatment of these issues, see generally SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000 (rev. ed. 2001).

320. *Palm Beach County*, 531 U.S. at 73.

321. *Id.* at 76–77.

Article II, as amended by the Twelfth Amendment, specifies the process for selecting the President.[322] The Constitution vests authority in the legislatures of the several states to choose the electors who vote for the President.[323] One of the constitutional issues raised in the litigation surrounding the 2000 presidential election was whether, by ordering the hand recount, the Florida Supreme Court had interfered with the Florida legislature's directive regarding how its electors would be chosen.[324] The Supreme Court granted Bush's petition for certiorari and on December 12 ordered that the recount must end.[325] By ending the recount, the Supreme Court effectively decided that George W. Bush would be the nation's forty-third President.

Instead, the Supreme Court might have declined to hear the case because it presented a political question. The Constitution vests in Congress the final word on whether the state legislature's procedures for choosing electors were followed.[326] Article II, as amended by the Twelfth Amendment, contains a series of "textually demonstrable" commitments of authority to Congress to resolve contested elections.[327] The Twelfth Amendment specifies that if no candidate wins a majority of the electoral votes, the House of Representatives chooses the President from among the top three candidates.[328] The Amendment's drafters did not anticipate that two political parties would rise to power permanently, so they envisioned that the House would select the President more often than not.[329]

322. U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend. XII.

323. *Id.* cl. 2 ("Each State shall appoint [its electors], in such Manner as the *Legislature* thereof may direct . . . .") (emphasis added). *See* McPherson v. Blacker, 146 U.S. 1, 33–36 (1892) (discussing the enactment of the Twelfth Amendment and confirming that the States have the exclusive power to determine the appointment of electors).

324. *Palm Beach County*, 530 U.S. at 73–76.

325. Bush v. Gore, 531 U.S. 98, 109–10 (2000) (per curiam). The majority's rationale was that the recount violated equal protection. *Id.* The rationale seemed out of place, which the per curiam opinion appeared to acknowledge by announcing that the judgment was limited to its facts. *See id.* at 109 ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

326. *See* Barkow, *supra* note 157, at 276–95 (discussing how the classical political question doctrine can be applied to Article II claims and arguing that because Article II gives Congress power over presidential elections, it must also give Congress the power to decide whether state electors are properly selected).

327. *Id.* at 265.

328. U.S. CONST. amend. XII.

329. *See* Barkow, *supra* note 157, at 284 ("Significantly, the [Constitution's Framers] fully expected that, because 'nineteen times in twenty' no candidate would command a

In addition, Article II, Section One specifies that Congress has the power to "count" the states' electoral votes,[330] which, throughout history, has included the power to determine a vote's validity.[331] In the Hayes–Tilden election of 1876, three different states sent two separate slates of electors to Congress, and their electoral votes would decide the presidency.[332] Congress appointed an ad hoc electoral commission to resolve the disputes.[333] Soon thereafter, Congress passed the Electoral Count Act, a statutory scheme specifying how Congress would execute its constitutionally assigned task of counting electoral votes in the future.[334] The Electoral Count Act specifies that Congress will resolve any disputes surrounding the electoral votes in the event that the states are unable to settle the disputes for themselves.[335] The Act's legislative history confirms that Congress intended that only Congress itself would resolve electoral disputes; the Supreme Court was intentionally excluded from the process.[336]

The *Marbury* Court believed that questions "in their nature political" were outside the Court's institutional capacity and were constitutionally committed to the political branches.[337] The *Bush v. Gore* Court, in sharp contrast, did not trust the political process even to determine who would hold the nation's highest political office. Far from doubting the Judicial Branch's institutional capacity to decide political questions, the Justices believed that only they held the political clout to avert a

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majority, the House would frequently determine the winner of the election.") (quoting THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 500 (Max Farrand ed., rev. ed. 1966)).

330. U.S. CONST. art. II, § 1, cl. 3.

331. Barkow, *supra* note 157, at 280.

332. *Id.*

333. Congress appointed five Senators, five Representatives, and five Supreme Court Justices to the commission, and the deciding vote fell to Justice Bradley, who was heavily criticized for not remaining impartial. *See* BICKEL, *supra* note 79, at 185.

334. Electoral Count Act of 1887, ch. 90, 24 Stat. 373 (current version at 3 U.S.C. § 15 (2006)).

335. *Id.* § 4.

336.

> The two Houses are, by the Constitution, authorized to make the count of electoral votes. They can only count legal votes, and in doing so must determine, from the best evidence to be had, what are legal votes . . . . The power to determine rests with the two houses, and *there is no other constitutional tribunal.*

H.R. Rep. No. 49-1638, at 2 (1886) (emphasis added) (quoted in Bush v. Gore, 531 U.S. 98, 154 (2000) (per curiam) (Breyer, J., dissenting)).

337. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

constitutional crisis. Justices Kennedy and Thomas testified before Congress that they had a "'responsibility'" to take the case and would have avoided it if only "'there was a way.'"[338] But the Electoral Count Act's provisions could have resolved the dispute peaceably, legitimately, and, most importantly, without the Court's trampling of constitutional separation-of-powers principles in the process.

On January 20, 2001, President George W. Bush took office. Nine months later, international terrorists attacked the United States.

## IV. *BOUMEDIENE V. BUSH*

On the morning of September 11, 2001, terrorists hijacked four commercial airplanes and aimed them at crucial governmental and financial centers within the United States. Two planes destroyed the Twin Towers of New York's World Trade Center. Another crashed into the Pentagon near Washington, D.C. The fourth plane, which was apparently aimed for either the White House or the Capitol building,[339] crashed in a field in Pennsylvania after civilian passengers attempted to overpower the terrorists. More than 3,000 people died, and thousands more were injured.[340] The attacks were orchestrated by al Qaeda, an international terrorist organization implicated in a series of attacks on the United States and its interests beginning long before September 11, 2001.[341] Those attacks include the World Trade Center bombing of 1993, the attack on U.S. military housing in Saudi Arabia in 1996, the bombing of American embassies in Kenya and Tanzania in 1998, and the bombing of the U.S.S. Cole in Yemen in 2000.[342] The Taliban militia, which is not a recognized arm of Afghanistan's government, but which nonetheless exercises military control

338. Barkow, *supra* note 157, at 336 (quoting Charles Lane, *2 Justices Defend Court's Intervention in Fla. Dispute*, WASH. POST, Mar. 30, 2001, at A13).

339. THE 9/11 COMMISSION REPORT 326 (2004), *available at* http://www.9-11commission.gov/report/911Report.pdf (last visited Dec. 20, 2009).

340. Rasul v. Bush, 542 U.S. 466, 470 (2004).

341. *See* THE 9/11 COMMISSION REPORT, *supra* note 339, at 50–63, 231–41 (discussing, among other things, a series of fatwas and other calls to engage Americans in war made by Usama bin Laden and other senior members of al Qaeda and the role of that organization in the 9/11 attacks).

342. *Id.* at 50–73.

over portions of that country, supported al Qaeda's training and activities.[343]

Congress swiftly authorized the President to use military force against "those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks."[344] The Bush Administration ordered the military detention at Guantanamo Bay, Cuba, of alien al Qaeda and Taliban fighters.[345] As the Supreme Court later acknowledged, detaining enemy fighters for the duration of the conflict was a "fundamental and accepted" principle of the customary laws of war.[346] But the Supreme Court held that the President would have to prove, as a matter of juridical fact, that the detainees had been involved in armed conflict against the United States.[347]

## A. *The Initial Detainee Habeas Cases*

In 2001, Yaser Hamdi—an American citizen—was captured in a combat zone in Afghanistan by the Northern Alliance, a group fighting against the Taliban militia.[348] The U.S. military later detained him as an enemy combatant.[349] Hamdi challenged his military detention, but a majority of the Supreme Court held that enemy combatants could be detained for the duration of the armed conflict.[350] The plurality opinion in *Hamdi v. Rumsfeld*, written by Justice O'Connor and joined by Chief

343. *Id.* at 63–70.

344. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

345. *See* Military Order of Nov. 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 9 C.F.R. 918 (2002), *reprinted in* 8 U.S.C. § 801 (2006) (granting authority to the Secretary of Defense to detain and try—subject to certain restrictions—international terrorists and other noncitizens).

346. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

347. *Id.* at 533.

348. *Id.* at 513.

349. *Id.* at 518.

350. *Id.* at 515. On the same day the Court entertained Mr. Hamdi's habeas petition, it also considered the petition of Jose Padilla. Robert H. Freilich, Ryan M. Manies, & Corey J. Mertes, *The Freilich Report 2003–04: The Supreme Court in an Age of Secrecy and Fear*, 36 URB. LAW. 583, 591 (2004). Mr. Padilla was an American citizen captured within the United States who allegedly planned to detonate a radioactive bomb here. Padilla v. Rumsfeld, 352 F.3d 695, 701 (2d Cir. 2003). He was detained as an enemy combatant and held for a time in New York before being transferred to South Carolina. Rumsfeld v. Padilla, 542 U.S. 426, 441 (2004). The issue decided by the Supreme Court in *Rumsfeld v. Padilla* was a narrow one: whether the federal court in New York had jurisdiction over Padilla's habeas petition after his transfer to South Carolina. *Id.* at 443, 447. Five members of the Court held the view that Padilla did have a right to habeas relief, even though New York was not the proper locale in which to press that right. *Id.* at 451.

Justice Rehnquist and Justices Kennedy and Breyer, held that the AUMF authorized the President to hold persons fighting against the United States until the conflict ended.[351] Justice Thomas, who provided a fifth vote, opined that the AUMF was unnecessary; the President had inherent authority as Commander in Chief to detain persons, including American citizens, who were deemed enemy combatants.[352]

The plurality asserted that Hamdi was entitled to some type of process to make a factual determination whether he was an enemy combatant.[353] At a constitutional minimum, an American citizen challenging his status as an enemy combatant was entitled to "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker."[354] The plurality acknowledged that this decision maker need not necessarily be an Article III court but rather could be "an appropriately authorized and properly constituted military tribunal."[355] Thereafter, the Deputy Secretary of Defense established Combatant Status Review Tribunals (CSRTs) to make factual determinations whether individuals detained at Guantanamo Bay were enemy combatants.[356]

The Court also considered *Rasul v. Bush*, where a number of noncitizens detained as enemy combatants at Guantanamo Bay sought habeas relief.[357] The Government moved to dismiss the habeas petitions on the grounds that the federal courts lacked authority to hear habeas petitions by noncitizens held at Guantanamo.[358] The *Rasul* majority nevertheless read 28 U.S.C. § 2241,[359] the federal habeas corpus statute, to authorize the Court to exercise jurisdiction over detainees held by the U.S. military in Cuba.[360]

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351. *Id.* at 533.
352. *Id.* at 589–90 (Thomas, J., dissenting).
353. *Id.* at 533 (plurality opinion).
354. *Id.*
355. *Id.* at 538.
356. Memorandum from Paul Wolfowitz, Deputy Sec'y, U.S. Dep't of Def., to the Sec'y of the Navy (Jul. 7, 2004), http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.
357. Rasul v. Bush, 542 U.S. 466, 470 (2004).
358. *Id.* at 484.
359. 28 U.S.C. § 2241 (2006).
360. *Rasul*, 542 U.S. at 484.

Congress quickly corrected the Court's misinterpretation of 28 U.S.C. § 2241 in the Detainee Treatment Act of 2005 (DTA),[361] which forbade all federal courts from exercising habeas jurisdiction over any detainee of Guantanamo Bay military prison.[362] The DTA vested in the United States Court of Appeals for the D.C. Circuit exclusive jurisdiction to review a determination by a CSRT that an alien is "properly detained as an enemy combatant."[363] The DTA authorized the D.C. Circuit to determine whether the CSRT's findings were "consistent with the standards and procedures specified by the Secretary of Defense" and whether those standards and procedures were "consistent with the Constitution and laws of the United States."[364]

The Supreme Court was not willing to accept Congress's constriction of its role in reviewing the legality of the detainees' incarceration. Giving the statute a tortured reading, the Court held that the DTA's jurisdiction-stripping provisions applied prospectively only, so the Court would continue to entertain the hundreds of pending habeas petitions filed by Guantanamo detainees.[365] Congress responded with the Military Commissions Act of 2006 (MCA), which even more clearly stripped the federal courts of jurisdiction over pending habeas petitions.[366] The MCA reconfirmed the D.C. Circuit's jurisdiction to review the CSRTs' determinations regarding enemy combatant status.[367]

In passing the MCA and stripping the Court of jurisdiction over the detainee's cases, Congress and the President stood firm in their conviction that the Supreme Court had no

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361. Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, 119 Stat. 2739 (codified as amended in scattered sections of 1, 5, 10, 15, 16, 28, 37, 41, 42, and 50 U.S.C.).

362. *Id.* at § 1005(e)(1). The DTA amended 28 U.S.C. § 2241 to provide that "no court, justice, or judge shall have jurisdiction to . . . consider . . . an application for . . . habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo." 28 U.S.C. § 2241(e)(1) (2006).

363. DTA § 1005(e)(2)(B).

364. *Id.* at § 1005(e)(2)(C).

365. Hamdan v. Rumsfeld, 548 U.S. 557, 577 (2006).

366. Military Commissions Act of 2006 § 7(a), 28 U.S.C.A. § 2241(e)(1) (Supp. 2009):

> No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or *is awaiting such determination.*

(emphasis added).

367. *Id.*

constitutional claim to judicial review over military detentions in connection with the War on Terror. Then, in *Boumediene v. Bush*, the Court held that § 7 of the Military Commissions Act violated the Suspension Clause[368] by denying the federal courts jurisdiction to adjudicate habeas corpus petitions from military detainees at Guantanamo Bay.[369] For the first time in history, the Court refused to stand aside when Congress exercised its Exceptions and Regulations power to check the Court's overreaching its legitimate sphere of authority.

### B. *The* Boumediene *Decision*

#### 1. The Majority Opinion

Justice Kennedy, writing for the majority of the Court, began by candidly acknowledging that "the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us."[370] Without pausing to articulate a statutory or constitutional provision that purportedly provided the jurisdiction to do so, the majority opinion then proceeded to analyze whether noncitizens detained outside the territory of the United States have a constitutional right to habeas corpus.[371] The *Boumediene* majority apparently assumed that the Suspension Clause created self-executing habeas jurisdiction in the Supreme Court in any case where the writ would have run in 1789—*apparently* because the Court did not expressly so state and *assumed* because the Court did not address this proposition's obvious tension with foundational cases like *Ex Parte McCardle*.

In the majority's view, if the writ of habeas corpus ran to aliens in foreign nations during the pre-constitutional period, then Article I, Section Nine would prevent Congress from making exceptions and regulations to its habeas jurisdiction over the Guantanamo detainees; therefore, the majority opinion focused heavily on the extraterritorial reach of the writ of habeas corpus in the British empire before 1789.[372] Justice Kennedy found historical inconsistencies regarding whether the writ was

368. U.S. CONST. art. I, § 9, cl. 2.
369. Boumediene v. Bush, 128 S. Ct. 2229, 2262 (2008).
370. *Id.* at 2244.
371. *Id.*
372. *Id.* at 2244–54.

available to foreign nationals or available in foreign lands.[373] The writ was unavailable to persons in Scotland, which lay within the King's territories, but the writ was available in Ireland, despite its status as an independent sovereign.[374] After a ten-page historical narrative, Justice Kennedy could draw "no certain conclusions" about whether a pre-1789 common law court would have granted a writ of habeas corpus brought by an enemy combatant detained outside the United States or would have refused to grant the writ for lack of jurisdiction.[375] For Justice Kennedy, the historical record did prove, however, that de jure sovereignty had not been the "touchstone" for habeas corpus jurisdiction.[376]

The Kennedy opinion's protracted exploration of the pre-constitutional history of habeas corpus contrasts sharply with the scant attention given the political question doctrine.[377] The only potential political question, in the Court's view, was whether Cuba or the United States held sovereign power at Guantanamo Bay.[378] The Court did not quibble with the obvious fact that Guantanamo Bay lies within Cuba's sovereign territory.[379] However, the Court said the political question doctrine did not forbid the Court from determining whether the United States held what Justice Kennedy called "*de facto* sovereignty"—that is, practical control—over Guantanamo.[380] "Were we to hold that the present cases turn on the political question doctrine, we would be required first to accept the Government's premise that *de jure* sovereignty is the touchstone of habeas corpus jurisdiction."[381] In three paragraphs, the majority opinion had rejected the notion that the political branches might be vested with unreviewable constitutional authority to determine whether the writ was available to the Guantanamo detainees.[382] For Justice Kennedy, the premise that the political branches, and not the Court, could determine whether to allow habeas

373. *Id.*
374. *Id.* at 2246–52.
375. *Id.* at 2248.
376. *Id.* at 2253.
377. *Id.* at 2252–53.
378. *Id.*
379. *Id.*
380. *Id.* at 2253.
381. *Id.*
382. *Id.*

jurisdiction would be "contrary to fundamental separation-of-powers principles."[383] Congress had the power to make laws, but it was the Court's province "'to say what the law is.'"[384]

Kennedy's opinion then reviewed a series of cases addressing, in his view, the geographic reach of the Constitution.[385] It focused on three decisions: The *Insular Cases*,[386] *Reid v. Covert*,[387] and *Johnson v. Eisentrager*.[388] In each case, Justice Kennedy wrote, the extent to which the petitioners were afforded constitutional rights did not turn solely on whether the geographic territory was formally part of the United States.[389] Instead, extraterritorial effect depended upon the "'particular circumstances, the practical necessities, and the possible alternatives which Congress had before it' and, in particular, whether judicial enforcement of the provision would be 'impractical and anomalous.'"[390]

The *Insular Cases*, decided following the Spanish–American War, addressed whether the Constitution applied of its own force in the newly acquired Philippine Islands or whether the Constitution would apply only if Congress passed enabling legislation.[391] Although the Court held that the Constitution automatically applied in new territories, it noted that practical difficulties would result from full-scale importation of all constitutional requirements.[392] It would disrupt the existing, well-functioning legal culture, one that should be kept intact since the U.S. intended that the Philippine Islands would return

383. *Id.*

384. *Id.* at 2259 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

385. *Id.* at 2254–60 .

386. The *Insular Cases* were a series of cases. Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901); Dooley v. United States, 183 U.S. 151 (1901); Huus v. N.Y. & P.R. S.S. Co., 182 U.S. 392 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Goetze v. United States, 182 U.S. 221 (1901); De Lima v. Bidwell 182 U.S. 1 (1901). *See generally* Juan R. Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 300–12 (discussing generally the facts of and the decisions in the *Insular Cases*).

387. 354 U.S. 1 (1957).

388. 339 U.S. 763 (1950).

389. Boumediene v. Bush, 128 S. Ct. 2229, 2254–56(2008).

390. *Id.* at 2255–56 (quoting *Reid*, 354 U.S. at 74–75 (Harlan, J., concurring)).

391. *Id.* at 2254.

392. *Id.*

to independence.[393] Thus, only "fundamental" constitutional protections would apply there.[394]

Justice Kennedy saw the same case-by-case, totality-of-the-circumstances analysis at work in *Reid*.[395] Civilian wives of military personnel had been tried by court martial for murders committed in England and Japan.[396] The Court held, however, that these American civilians were constitutionally entitled to trial by jury.[397] While Justice Kennedy conceded that their American citizenship was a "key factor" in the *Reid* Court's conclusion that they were entitled to jury trials, practical considerations also played a part.[398]

Finally, Justice Kennedy addressed *Johnson v. Eisentrager*.[399] The *Eisentrager* Court had refused to grant a writ of habeas corpus and had noted that the prisoners "'at no relevant time were within any territory over which the United States is sovereign.'"[400] Justice Kennedy wrote that "because the United States lacked both *de jure* sovereignty and plenary control over Landsberg Prison, it is far from clear that the *Eisentrager* Court used the term sovereignty only in the narrow technical sense and not to connote the degree of control the military asserted over the facility."[401] Instead, Justice Kennedy contended, the *Eisentrager* opinion also focused on the practical difficulties involved in transporting prisoners and "damag[ing] the prestige of military commanders at a sensitive time."[402]

The Kennedy opinion interpreted the writ's history and the Court's precedence in light of "fundamental separation-of-powers principles,"[403] which, in the majority's view, demanded that the Guantanamo Bay detainees have access to habeas corpus review.[404] If the Court's habeas power depended upon formal state sovereignty, then "it would be possible for the political branches to govern without legal constraint" in foreign

393. *Id.*
394. *Id.*
395. *Id.* at 2255–56.
396. *Id.* at 2255.
397. *Id.*
398. *Id.* at 2256.
399. *Id.* at 2257.
400. *Id.* at 2257 (quoting Johnson v. Eisentrager, 339 U.S. 763, 778 (1950)).
401. *Id.* at 2257 (citation omitted).
402. *Id.* at 2257 (citing *Eisentrager*, 339 U.S. at 779).
403. *Id.* at 2253.
404. *Id.* at 2262.

territory.[405] In the Court's view, permitting the political branches to operate without the possibility of habeas review in federal court would mean that "the political branches have the power to switch the Constitution on or off at will."[406]

The majority listed three factors that would determine whether the Suspension Clause vests the Court with power to issue habeas writs to an alien held outside U.S. borders: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[407] Applying the first factor, the Court pointed to *Eisentrager*'s trial by military commission as the ideal level of process for determining whether the Guantanamo detainees were in fact enemy combatants.[408] The prisoners in *Eisenstrager* had received a full trial by military commission for war crimes, with a bill of particulars and detailed factual allegations against them.[409] They were afforded legal counsel and the right to cross-examine witnesses.[410] In comparison, CSRT hearings provided the detainee with a "Personal Representative," rather than legal counsel.[411] The Government's evidence was presumptively valid, and the detainee was permitted to present only "reasonably available" evidence.[412] The CSRT process, Justice Kennedy wrote, fell "well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review."[413] Regarding the second factor, the Court opined that the military held a higher level of control over the Guantanamo military base than over Landsberg prison in Germany following World War II.[414]

As for the third factor, the "practical obstacles," the majority was "sensitive" to the fact that affording habeas petitions to

405. *Id.* at 2258–59.
406. *Id.* at 2258.
407. *Id.* at 2259.
408. *Id.*
409. *Id.* at 2260.
410. *Id.* at 2260.
411. *Id.*
412. *Id.*
413. *Id.*
414. *Id.* at 2261.

detainees in federal court costs money and "may divert the attention of military personnel from other pressing tasks."[415] The majority did not, however, find these facts "dispositive."[416] The Executive Branch, in their view, presented "no credible arguments that the military mission at Guantanamo would be compromised" by the federal courts' exercise of habeas corpus jurisdiction.[417]

In the end, the majority held that its habeas jurisdiction could not be constricted through the MCA's jurisdiction-stripping provision.[418] Congress could limit the Court's jurisdiction only through a "formal" suspension of the writ.[419] The Court neither cited authority for the proposition that a suspension of habeas must be "formal" nor did it explain what a "formal" suspension might entail.[420]

### 2. The Dissenting Opinions

Chief Justice Roberts and Justices Scalia, Thomas, and Alito signed onto two separate dissents.[421] Both dissents were highly critical of the majority's decision, which upended the CSRT review process and provided the detainees with constitutional rights to habeas corpus review of the CSRT decisions in federal court. But the dissenters did not dispute certain fundamental assumptions underlying the majority opinion. In the Justices' unanimous view, the Supreme Court's role in the constitutional enterprise was to declare the true meaning of the Constitution;[422] it was for the Court, not the political branches, to give an authoritative interpretation of the Suspension Clause's cryptic language and the writ's uncertain history.[423] Moreover, Congress was apparently powerless to strip the Court of jurisdiction to make those determinations, despite Congress's unqualified constitutional authority to limit the Court's

415. *Id.*

416. *Id.*

417. *Id.*

418. *Id.* at 2262.

419. *Id.*

420. The *Boumediene* majority enigmatically opined that "[n]othing in [Hamdan v. Rumsfeld, 548 U.S. 557 (2006)] can be construed as an invitation for Congress to suspend the writ." *Id.* at 2242.

421. *Id.* at 2279–93 (Roberts, C.J., dissenting); *id.* at 2293–307 (Scalia, J., dissenting).

422. *Id.* at 2304 (Scalia, J., dissenting).

423. *Id.*

jurisdiction.[424] Every Justice on the *Boumediene* Court held the opinion that Congress's enumerated power to make exceptions to the Court's jurisdiction was limited, not plenary. As Justice Scalia's dissent phrased it, "[a]s a court of law operating under a written Constitution, our role is to determine whether there is a conflict between [the Suspension] Clause and the Military Commissions Act."[425] The dissenters, like the majority, did not explain where the Court acquired jurisdiction to entertain that question even after the MCA stripped its jurisdiction to hear any case involving the detainees. Did the Court believe that the Suspension Clause provided self-executing habeas corpus jurisdiction to the federal courts? Perhaps the Court believed that the Suspension Clause restricted Congress from ever diminishing the courts' habeas jurisdiction once Congress granted that jurisdiction in the first instance. The dissenting opinions did not explore these questions, and they did not dispute the majority's implicit conclusion that these were not political questions.

The thrust of Justice Roberts's dissent was that the DTA's statutory processes for making enemy combatant determinations satisfied due process.[426] Congress had modeled the combatant-status-determination upon Army Regulation 190-8, which the *Hamdi* plurality presented as a model of the level of procedural protections an enemy combatant would receive from a habeas court.[427] Under the DTA, the Combatant Status Review Tribunals reviewed initial battlefield determinations of combatant status.[428] CSRTs "operate much as habeas courts . . . [t]hey gather evidence, call witnesses, take testimony, and render a decision on the legality of the Government's detention."[429] The *Hamdi* plurality had opined that this first level of review would satisfy constitutional due process standards for American citizens challenging their enemy combatant status.[430] However, Congress went much further than the constitutional minimum and extended the CSRT review process

424. *See supra* notes 113–16 and accompanying text.
425. *Boumediene*, 128 S. Ct. at 2296 (Scalia, J., dissenting).
426. *Id.* at 2279 (Roberts, C.J., dissenting).
427. *Id.* at 2284 (citing Hamdi v. Rumsfeld, 542 U.S. 507, 538 (2004).
428. *Id.*
429. *Id.*
430. *Id.*

to all detainees, American and alien alike.[431] Congress also provided for an additional layer of review by an Article III court.[432] The DTA authorized the D.C. Circuit to determine not only whether the CSRT's finding in a particular detainee's case "was consistent with the standards and procedures specified by the Secretary of Defense" but also "whether the use of such standards and procedures to make the determination [was] consistent with the Constitution and laws of the United States."[433] The *Boumediene* petitioners had never made use of these statutory remedies.[434]

Justice Scalia wrote separately to emphasize a point he considered "more fundamental still," which was that the writ of habeas corpus had never been available to noncitizens in foreign lands.[435] The Suspension Clause thus did not provide the detainees with habeas rights.[436] Justice Scalia began from the proposition that the Court owes deference to Congress's judgments.[437] Its statutes are entitled to a presumption of constitutionality, and this is especially true in foreign and military affairs.[438] Indeed, Justice Kennedy's majority opinion admitted that, despite his careful examination of pre-constitutional history, he could not come to a certain conclusion regarding whether the writ would have run to aliens outside our borders.[439] For Justice Scalia, this meant that the Court had no basis for striking down the MCA.[440] The Court must defer to Congress's judgment.[441] Justice Scalia nonetheless contended that the majority had incorrectly judged the historical evidence regarding the geographical reach of the writ of habeas corpus.[442] In his view, pre-constitutional and early post-1789 precedents plainly demonstrated that the writ was not available to noncitizens abroad.[443]

431. *Id.*
432. *Id.*
433. *Id.*
434. *Id.*
435. *Id.* at 2294 (Scalia, J., dissenting).
436. *Id.*
437. *Id.* at 2296.
438. *Id.* at 2296–97.
439. *Id.* at 2251 (majority opinion).
440. *Id.* at 2297 (Scalia, J., dissenting).
441. *Id.*
442. *Id.* at 2298–302.
443. *Id.*

### C. *Separation of Powers After* Boumediene

Both the majority and dissenting opinions in *Boumediene* gave remarkably short shrift to two critical issues. The first was the political question doctrine. The second was Congress's power under Article III, Section Two to make exceptions to the Court's appellate jurisdiction.[444] The issues stand in close relationship to one another, since both allocate final constitutional decision-making authority away from the Judicial Branch and place that power within the political branches. Jurisdiction stripping is one of Congress's expressly granted constitutional means for checking the Judicial Branch from abusing sovereign power.[445] The political question doctrine, on the other hand, is a sort of check on the Judicial Branch imposed by the Court itself. It is a judicially crafted doctrine meant to ensure that the Judicial Branch does not usurp legislative or executive power.[446]

The early Court did not view jurisdiction regulation or the political question doctrine as conflicting with the judicial role because the early Court did not view itself as the sole interpreter of the Constitution.[447] That is no longer the case. The modern Court views the political branches' constitutional interpretations as only second-best guesses of "true" constitutional meaning, which the Court may fine-tune or reject as it sees fit. Neither the political question doctrine nor jurisdiction stripping can coexist with the Court's new conception of itself as supreme interpreter of the Constitution.

#### 1. The Political Question Doctrine in *Boumediene*

The *Boumediene* decision, which spans seventy-seven pages in the Supreme Court Reporter, devotes three paragraphs to the political question doctrine.[448] The only potential political question any member of the Court could identify was an inconsequential one: the Court did "not question the Government's position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the

444. U.S. CONST. art. III, § 2, cl. 2.
445. *Id.*
446. *See supra* note 157 and accompanying text.
447. *See supra* Part II.
448. *Boumediene*, 128 S. Ct. at 2253.

term, over Guantanamo Bay."[449] The majority opinion did not pause for even a moment to consider whether the political branches possessed all constitutional authority to interpret their own and the others' war powers.

*Boumediene* marks a clear break with precedent. Until September 11, 2001, the Court had consistently taken the position that any constitutional questions arising from the military detention or prosecution of enemy combatants were political questions to be answered by the political branches alone.[450] The classic political question doctrine posits that the Constitution itself, by virtue of vesting an extraordinary level of discretionary power in one of the political branches, leaves all constitutional questions regarding the limits of that power in that single branch.[451] This doctrine finds its roots in *Marbury v. Madison,* the case that declared the power of judicial review itself, and the two doctrines are inextricably intertwined. Both judicial review and the political question doctrine are judicially crafted instruments for protecting the people's interests by ensuring that sovereign power remains dispersed in accordance with the constitutional plan.[452] In *Marbury,* Chief Justice Marshall made the claim, radical at the time, that the Judicial Branch could issue writs of mandamus to high-order Executive Branch officials.[453] However, the Chief Justice also said that the Court could only order the Executive Branch to perform ministerial duties—those unambiguous legal obligations which left no room for discretion.[454] Where the Executive was vested with discretionary decision-making authority, even deferential judicial review would go too far.[455] It would trespass on a core constitutional function solely dedicated to a coordinate branch, violating separation-of-powers precepts.[456]

The political branches' powers to wage war have historically been viewed as the paradigmatic political question.[457] War

449. *Id.* at 2252.

450. *See supra* Part II.C.

451. *See supra* note 157.

452. *See* discussion *supra* Part II.C.

453. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 149–50 (1803).

454. *Id.* at 149–50.

455. *Id.* at 166.

456. *Id.* at 166.

457. *Boudemiene* presented a second set of political questions that should have been resolved in Congress alone: questions involving Article III, Section Two, which vests in Congress the unconditional power to control the federal courts' jurisdiction, and the

powers are the Constitution's clearest "textually demonstrable constitutional commitment" of authority to the political branches.[458] The constitutional text is far more detailed in describing Congress's range of authority over the military than other congressional powers. The sheer number of provisions is striking: Congress has the power to "provide for the common Defence and general Welfare of the United States;"[459] "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;"[460] "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;"[461] "raise and support Armies;"[462] "provide and maintain a Navy;"[463] "make Rules for the Government and Regulation of the land and naval Forces;"[464] "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;"[465] and "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States."[466]

The Constitution also vests significant war power in the Executive Branch by declaring the President to be the "Commander in Chief of the Army and Navy of the United States."[467] The Constitution makes no attempt to specify how the President shall go about performing this function. It is instead a matter left to the President's discretion, so the Judicial Branch has no "judicially discoverable standards" upon which to judge whether the President exercised that discretion within constitutional bounds.[468] All powers over war were granted to the political branches, without specifying a precise dividing line

Suspension Clause, which vests in Congress the power to suspend habeas corpus jurisdiction "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. III, § 2, cl. 2; *id.* art. I, § 9, cl. 2. These constitutional provisions vest in Congress two checks on the Court's power. If the Court holds the power of judicial review over another branch's constitutional check on the Court's own abuses, then that check is no check at all.

458. Baker v. Carr, 369 U.S. 186, 217 (1962).

459. U.S. CONST. art. I, § 8, cl. 1.

460. *Id.* cl. 10.

461. *Id.* cl. 11.

462. *Id.* cl. 12.

463. *Id.* cl. 13.

464. *Id.* cl. 14.

465. *Id.* cl. 15.

466. *Id.* cl. 16.

467. *Id.* art. II, § 2, cl. 1.

468. Baker v. Carr, 369 U.S. 186, 217 (1962).

between them. The Framers blended and overlapped military powers in two separate branches to create an "intentional gray area, or zone of shared powers, requiring the legislative and executive branches to work out the allocation of power and responsibility."[469] This blending of powers created a strong system of checks and balances.[470] Congress and the President might cooperate or might conflict over military policy, but neither had exclusive control over standing armies.[471] Each political branch would stand ready to check any unconstitutional action by the other.[472]

Soon after the September 11th terrorist attacks and consistent with the customary laws of war, the Bush Administration took the position that the military could detain enemy combatants until the cessation of hostilities, and that no formal juridical process was necessary to determine who was an enemy combatant.[473] But the War on Terror was like no other war before it. Its temporal boundaries were uncertain, with the potential to last for decades or beyond. The battlefield had no geographic boundaries. The enemy wore no uniform. Combatants might live in Afghanistan or in Brooklyn. Under these conditions, the potential for erroneously detaining a non-enemy civilian was exponentially higher than in previous wars where military personnel could generally separate civilians from combatants with relative ease.[474]

Given these facts, the Supreme Court broke with the established tradition of non-involvement in military matters and entertained *Hamdi v. Rumsfeld* on a writ of habeas corpus. *Hamdi* acknowledged that the customary laws of war allow the detainment of combatants captured in the course of battle until the conflict ceases.[475] But the plurality was concerned about the

469. Geoffrey Corn & Eric T. Jensen, *The Political Balance of Power Over the Military: Rethinking the Relationship Between the Armed Forces, The President, and Congress*, 44 HOUS. L. REV. 553, 563 (2007).

470. *Id.*

471. *Id.* at 564.

472. *Id.* at 565.

473. Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, to Daniel J. Bryant, Assistant Attorney Gen., Office of Legis. Affairs, U.S. Dep't of Justice (June 27, 2002),
http://www.justice.gov/olc/docs/memodetentionuscitizens06272002.pdf.

474. *See generally* Brooks, *supra* note 185, at 104–06 (discussing one's status under the Geneva Convention as hinging on questions of form and not on one's substantive actions).

475. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

possibility that humanitarian aid workers and journalists could be captured, mistaken for enemy combatants, and incarcerated in a war on terror that could last two generations.[476] At the same time, the *Hamdi* plurality recognized the "weighty and sensitive governmental interests" in detaining enemies who have fought against the United States.[477] Further, *Hamdi* acknowledged that the political branches, not the Court, were responsible for wartime decision making: "Without doubt, our Constitution recognizes that core strategic matters of war making belong in the hands of those who are best positioned and most politically accountable for making them."[478] Weighing these competing concerns, *Hamdi* held that an American citizen detained as an enemy combatant had a constitutional right to "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker."[479]

*Hamdi* might thus be viewed as opening a dialogue with the political branches regarding the proper interpretation of constitutional norms.[480] The plurality's tone was diplomatic and collaborative. Although it held that some level of process was owed to the detainees before they could be indefinitely detained, *Hamdi* did not attempt to dictate precisely what that process must entail. The military could choose a process that permitted hearsay and gave a rebuttable presumption in favor of the Government's evidence.[481] *Hamdi* conceded that Article III courts might have no role to play in the detainees' cases.[482]

The Court's tone quickly changed when Congress revoked its jurisdiction to consider additional habeas cases from alien enemy combatants. *Boumediene* apparently considered the MCA's jurisdiction-stripping provisions to be an affront to the Court's place in the constitutional chain of command. The

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476. *Id.* at 530–31.

477. *Id.* at 531.

478. *Id.*

479. *Id.* at 533.

480. *See* Robert C. Post & Reva B. Siegel, *Protecting the Constitution From the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 3 (2003) (arguing constitutional structure of separated coequal branches was intended to encourage compromise and dialogue among governmental branches).

481. *Hamdi*, 542 U.S. at 533–34.

482. *See id.* at 538 ("There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal.").

Court proclaimed that the CSRT procedures did not comply with due process, without identifying any particular shortcomings.[483] *Boumediene* then delegated to the district courts the task of devising new procedures that would meet the detainees' constitutional rights of due process.[484] In response to the Government's concern that vital classified information presented in those habeas proceedings would find its way into enemy hands, *Boumediene* refused to "attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise" in the district courts.[485] Those were questions "within the expertise and competence of the District Court to address in the first instance."[486]

The *Boumediene* Court had lost sight of the limits of the judiciary's institutional capacity. The legitimacy of a judicial decision depends upon an even-handed application of the law. The Court must determine whether the law protects one party's security against his opponent's actions or whether the law instead leaves the opponent at liberty to continue those actions. In an ordinary case, statutory or common law will usually provide a relatively straightforward answer to that legal question. The open-textured language of the Constitution, on the other hand, protects *both* of these values—liberty and security—which often stand in direct opposition to one another. The Constitution secures individual liberties and provides for the common defense and domestic tranquility.[487] The early Court largely left balancing between the two values to the political branches through the complementary principles of deferential judicial review and the political question doctrine.[488] From the 1930s to the 1990s, the Court took an active role in defining and enforcing individual liberties but continued to defer to the political branches' constitutional interpretations in foreign-policy matters in general and wartime policy decisions in particular.[489] Each arrangement was a more acceptable balancing of sovereign power among the coordinate branches. These tacit settlement agreements each achieved a chief aim of

483. Boumediene v. Bush, 128 S. Ct. 2229, 2258–61 (2008).
484. *Id.* at 2276.
485. *Id.*
486. *Id.*
487. U.S. CONST. amends. I–VIII; *id.* pmbl.
488. *See supra* Part II.C.
489. *See supra* Part III.

the Constitution: to disperse governmental power so as to protect the people's own sovereignty and influence over their government.[490]

However, the modern Court has abandoned the Framers' vision of separation of powers. *Boumediene* exemplifies a new vision of "fundamental separation-of-powers principles,"[491] different not just in degree but in kind from historical understandings of that phrase. The Court is the keeper of the Constitution; the political branches are to concern themselves only with politics—in the most derogatory sense of the term. The Court distrusts the political branches and the political process. Where the early Court considered it beyond the capacity of the judiciary to balance constitutional rights that implicate larger issues of policy vitally affecting the nation, the modern Court views itself as not only capable of balancing competing constitutional rights but also as the *only* branch capable of doing so.

### 2. The End of Congress's Power to Control the Court's Jurisdiction?

*Boumediene* began with the Court's acknowledgement that "the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us."[492] The opinion should have ended with that admission. Article III provides that Congress may make "Exceptions" from and "Regulations" to the Court's jurisdiction.[493] The Constitution places no limitations on Congress's discretion.[494] With the exception of a small class of cases within its original jurisdiction,[495] the Supreme Court may adjudicate a case only where Congress has, by statute, granted it jurisdiction to do so.[496] Congress did not grant the federal courts jurisdiction to hear habeas petitions from the Guantanamo detainees but, to the contrary, enacted a series of

490. *See supra* notes 39–41 and accompanying text.

491. *Boumediene*, 128 S. Ct. at 2253.

492. *Id.* at 2244.

493. U.S. CONST. art. III, § 1, cl. 2.

494. *See* Palmore v. United States, 411 U.S. 389, 400–01 (1973) (holding that, per its constitutional power to legislate for the District of Columbia, Congress may establish laws to try local criminal cases before judges who are not accorded life tenure or an indiminishable salary).

495. U.S. Const. art. III, § 2, cl. 2.

496. *Id.*

statutes stripping the Court of habeas jurisdiction in no uncertain terms.[497]

Neither the *Boumediene* majority nor the dissenters mentioned the landmark cases that acknowledged Congress's plenary power and unreviewable discretion to prevent the Court from exercising habeas jurisdiction. In *Ex parte Bollman*, Chief Justice Marshall explained that if Congress chose not to provide the Court with statutory jurisdiction to issue writs of habeas corpus, then "the privilege [of the writ] itself would be lost."[498] *Bollman* thus belied any suggestion that the Suspension Clause vests self-executing habeas jurisdiction in the federal Judiciary.[499] *Boumediene* also failed to acknowledge *Ex parte McCardle*, where Congress stripped the Court of jurisdiction to consider a then-pending habeas petition.[500] "The first question necessarily is that of jurisdiction," said *McCardle*, and once it was determined that Congress had revoked the Court's jurisdiction, it was "useless, if not improper, to enter into any discussion of other questions."[501] The *McCardle* Court was undoubtedly perturbed that Congress had prevented it from exercising influence over the course of Reconstruction, and yet, even a year later in *Ex parte Yerger*, the Court acknowledged that the Constitution had squarely committed to Congress the unreviewable discretion to determine whether the Court should exercise habeas

497. Military Commissions Act of 2006 § 7(a), 28 U.S.C.A. § 2241(e)(1) (Supp. 2009)); Detainee Treatment Act of 2005 § 1005(e)(1), 28 U.S.C. § 2241(e)(1) (2006).

498. *Ex parte* Bollman 8 U.S. (4 Cranch.) 75, 95 (1807).

499. No party in *Bollman* actually made such a suggestion. Neither prisoner's attorney argued that Article I, Section Nine gave the Supreme Court self-executing habeas jurisdiction. This is consistent with William Duker's leading text on the subject, which explains that the Suspension Clause did not create an individual right to habeas corpus in any person. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 133–36 (1980). It instead protected *state courts*' habeas jurisdiction from congressional interference because the Framers intended that the state courts would issue writs of habeas corpus to ensure the legality of federal detention. *Id.* The language of Article I, Section Nine, which forbids Congress from *suspending* habeas, presupposes the existence of habeas relief. At the time that language was drafted, state courts had jurisdiction (in varying degrees) to issue writs of habeas corpus. *Id.* at 111–15, 129–30. But there was no federal habeas relief because there were no federal courts. The Articles of Confederation made no provision for federal courts, and the Constitution had not yet been ratified. *Id.* at 131. Even after ratification created the Supreme Court, the Constitution left to Congress the decision whether to create lower federal courts and whether to grant jurisdiction to any federal court. *Id.* at 133–36.

500. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 512 (1868).

501. *Id.*

jurisdiction in any case, including cases alleging constitutional violations and deprivations of liberty.[502]

*McCardle* and *Bollman* were a consequence of the early Court's conception of the Constitution's separation-of-powers structure and the political theory that drove the Framers to settle upon that structure. The Framers divided power among three branches because they knew to a moral certainty that power corrupts.[503] No one branch could be trusted with absolute dominion over constitutional interpretation, or else the Constitution would cease to perform its chief function, which was to protect the people from overweening governmental power.[504] The Constitution delegated various enumerated powers to each branch, but the Constitution did not expressly grant the power of constitutional review to any single institution.[505] The power and duty of constitutional review was instead an implied power, shared by all the coordinate branches.[506] It derived from the Supremacy Clause, which declares the Constitution the supreme law of the land,[507] and from the Constitution's requirement that each branch swear a solemn oath to uphold the Constitution.[508]

The Constitution would almost certainly not have been ratified if the people had believed that the politically unaccountable Judiciary would have ultimate control over constitutional meaning.[509] Anti-Federalists had opposed ratification on the grounds that an unelected and unaccountable Court would have "the supreme and uncontroulable power, to determine, in all cases that come before them, what the constitution means."[510] The constitutional structure was flawed, they argued, because "[t]he

502. *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 103–06 (1869).

503. *See supra* Part II.A.

504. *See supra* Part II.A.

505. *See supra* Part II.A.

506. *See supra* Part II.A.

507. U.S. Const. art. VI, cl. 2.

508. *Id.* cl. 3.

509. *See* Paulsen, *supra* note 40, at 245–52 (reviewing the concerns of Anti-Federalists that "unelected, unaccountable judges" would become the effective lawgivers and Alexander Hamilton's counterarguments to these concerns).

510. Brutus, *No. 12*, *in* 2 THE COMPLETE ANTI-FEDERALIST 9.148 (Herbert J. Storing ed., Univ. of Chi. Press 1981); *see* Shlomo Slonim, *Federalist No. 78 and Brutus' Neglected Thesis on Judicial Supremacy*, 23 CONST. COMMENT. 7, 10 (2006) (expanding on Brutus' view that the "judgment of the judicial [branch] . . . will become the rule to guide the legislature in their construction of their powers").

opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or controul their adjudications."[511]

Hamilton forcefully denied these charges in *The Federalist No. 78*.[512] He began by showing that the Judiciary was an inherently weak institution. In comparison with the Legislative Branch, which "commands the purse" and enacts the laws, and the Executive Branch, which "holds the sword of the community," the Judicial Branch's influence was limited to issuing persuasive decisions in individual cases.[513] The Judiciary was so weak, in fact, that it could not even enforce its own judgments but was instead dependent upon the Executive Branch.[514] Life tenure—during good behavior—and salary protections were therefore necessary to ensure that the Judicial Branch would not be "overpowered, awed, or influenced by its co-ordinate branches."[515]

Hamilton then turned to the first principles animating the constitutional structure: The Constitution was supreme law, and "every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void."[516] If the Legislature enacted a statute that conflicted with the Constitution, then the Judiciary had a constitutional duty to prefer the Constitution over the act.[517] This implied power of judicial review did not, however, "by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both."[518] If Congress were "themselves the constitutional judges of their own powers" and could issue constitutional interpretations "conclusive upon the other departments," then the Constitution could be disregarded at will.[519] This, Hamilton said, "cannot be

511. Slonim, *supra* note 510, at 10 (citing Brutus, *supra* note 510, at 9.148).
512. *Id.*
513. THE FEDERALIST No. 78 (Alexander Hamilton), *supra* note 23, at 438.
514. *Id.*
515. *Id.*
516. *Id.*
517. *Id.*
518. *Id.* at 439.
519. *Id.* at 438.

the natural presumption where it is not to be collected from any particular provisions in the Constitution."[520]

Precisely the same principles apply to the Judicial Branch. "[*E*] *very* act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void."[521] The Court, no less than the political branches, is obliged to obey the supreme law of the Constitution. Should it abuse its delegated authority and substitute its own policy preferences for Congress's—rewriting the Constitution under the guise of interpreting it—then the Court's actions are void. There are no "particular provisions in the Constitution" naming the Supreme Court "the constitutional judges of [its] own powers" or stating that "the construction [it] put[s] upon them is conclusive upon the other departments."[522] Since the Judicial Branch was dependent upon the Executive to enforce its judgments, and since the Judiciary's constitutional interpretations were not conclusive upon the Executive, the Executive could refuse to enforce its judgments in the event—wholly unlikely, in Hamilton's view—that the weakest branch usurped another branch's rightful authority.[523]

Judicial supremacy is directly contrary to the Founding Fathers' intention that "each department should have a will of its own."[524] To prevent "a gradual concentration of the several powers in the same department," the Constitution gave "each department the necessary constitutional means and personal motives to resist encroachments of the others."[525] In *Bollman* and *McCardle*, the Court acknowledged one of the key constitutional checks on encroachments by the Judicial Branch:

520. *Id.*

521. *Id.* at 438 (emphasis added); *see also* Paulsen, *supra* note 40, at 248–52 (examining Hamilton's views on judicial review and Chief Justice Marshall's similarly reasoned understanding that "an act of the legislature, repugnant to the constitution, is void" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

522. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 23, at 438.

523. Paulsen, *supra* note 40, at 252. Professor Paulsen explains that Hamilton did not dwell on the fact that the Executive was not bound to enforce the Judiciary's unconstitutional acts because the Framers did not believe that the Judiciary would ever gain sufficient power to encroach on other branches' authority. *Id.* Moreover, the Anti-Federalists were already far more wary of a strong executive than an independent judiciary. *Id.*

524. THE FEDERALIST No. 51 (James Madison), *supra* note 23, at 319.

525. *Id.*

the power of Congress given by Article III, Section Two to make exceptions and regulations to the Court's jurisdiction.[526]

These foundational premises—that the Judicial and political branches possess equal authority to interpret the Constitution and that Congress may check the Court's violations of separation-of-powers principles—are no longer acceptable to the modern Court. *Boumediene* seemed to find it intolerable that Congress could remove the Court from the enemy combatant review process. The Court believed itself the only arm of government constituted to act on principle and imagined that Congress and the President were willing to sacrifice the deepest values embodied in the Constitution. The Court believed that rights to due process are something that it respects but that the other political branches violate to satisfy the base preferences of their constituents. In the Court's view, Congress and the President would subjugate the Constitution were it not for strict judicial oversight.

With these as its underlying assumptions, the *Boumediene* Court treated constitutional review as if it were an enumerated and delegated power expressly given to the Judicial Branch and to the Judicial Branch alone. The Court acted as if it viewed itself as the ultimate referee of constitutional-boundary disputes, even where its *own* errors in constitutional interpretation and abuses of constitutional power were at issue. In Congress's independent judgment, the Court had seriously misinterpreted its own constitutional power in declaring its intention to hear habeas claims filed by Guantanamo detainees. Congress used its constitutional Exceptions and Regulations check on the Court to enforce a contrary interpretation.[527] But *Boumediene* deemed Congress and the President unqualified to judge whether the Court had overreached its legitimate sphere of constitutional authority. It would be a "striking anomaly," Justice Kennedy

526. *Ex parte* McCardle, 74 U.S. (7 Wall.) 505, 512–14 (1868); 8 U.S. (4 Cranch) 75, 116 (1807).

527. *See* Military Commissions Act of 2006 § 7(a), 28 U.S.C.A. § 2241(e)(1) (Supp. 2009)

> No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

wrote, if "Congress and the President, not this Court, [could] say 'what the law is.'"[528]

*Boumediene* treated Congress's Exceptions and Regulations power as a narrow and limited one, which could not prevent the Court from exercising its paramount power of judicial review. The writ of habeas corpus was "an indispensible mechanism for monitoring the separation of powers," Justice Kennedy wrote, and the Suspension Clause "must not be subject to manipulation by those whose power it is designed to restrain."[529] Justice Scalia's dissent soundly criticized Justice Kennedy's argument on the grounds that the Court, not Congress, had manipulated the writ's historical reach.[530] But even the dissenters, like the majority, still believed that only the Court could give an authoritative interpretation of the Suspension Clause and further believed that Congress could not prevent the Court from adjudicating that issue. Congress's constitutional Exceptions and Regulations check on the Court is no check at all if the Court has the power to decide whether Congress can use it.[531]

The Court viewed the MCA's jurisdiction-stripping provisions as a sinister and illegitimate attempt "to switch the Constitution on or off at will."[532] This is the way many commentators view jurisdiction regulation, as well. Consider this passage from Professor Henry Hart's famous article, written in the form of Socratic dialogue:

> Q: [Suppose Congress stripped all courts of jurisdiction to entertain a constitutional question.] Why wouldn't the executive department then be free to go ahead and violate fundamental rights at will? . . . . The problem can easily arise by deliberate action directed to an unpopular group, or even by inadvertence. Suppose Congress says flatly that no court shall have jurisdiction in such and such a situation, even in habeas corpus?

528. Boumediene v. Bush, 128 S. Ct. 2229, 2259 (2008) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

529. *Id.*

530. *Id.* at 2296–98 (Scalia, J., dissenting).

531. What remedy is left if Congress got serious about separation of powers, other than impeachment of Justices? If Congress took that step, would the Court claim the ultimate constitutional power to interpret Article III's provision that federal judges shall "hold their Offices during good Behaviour"? U.S. CONST. art. III, § 1.

532. *Boumediene*, 128 S. Ct. at 2259.

> A: The habeas corpus part of it would be in direct violation of the Constitution. Article I, Section [Nine], Clause [Two].[533]

Professor Hart, like the *Boumediene* Court, believes that the political branches would "violate fundamental rights at will" if the Judicial Branch were not keeping them in check.[534] He is not alone.[535] The legal elite often "takes for granted various unflattering stereotypes respecting the irrationality and manipulability of ordinary people and their susceptibility to committing acts of injustice."[536] Those who advocate judicial supremacy tend to view the Court as a beneficent guardian of constitutional rights and to believe that the political branches would disregard those rights were it not for the Court's oversight.

History belies these claims. Military history provides a particularly apt example because until September 11, 2001, only the political branches were responsible for crafting the rules by which the military conducted warfare.[537] The Court, without exception, declared that matters of wartime military policy were political questions, and the Court lacked jurisdiction to entertain them.[538] The political branches alone were responsible for reviewing the constitutionality of the nation's military actions.[539] Throughout the nation's history, the President, in consultation with Congress and concert with the international community, created the rules for waging warfare, and the customary laws of war have become increasingly more humane

533. Henry M. Hart Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1396–97 (1953).

534. *Id.* at 1397.

535. Many academics share this view. *See, e.g.*, Leonard Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 929–30 (1982) (criticizing the ability of Congress to limit courts' jurisdiction); Lawrence Sager, *Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 21–22 (1981) (challenging Congress's ability to limit courts' jurisdiction); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 130 (1981) (arguing that restricting the Court's jurisdiction is not a defensible response to Court rulings to which the political branches disagree); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 498 (1974) (arguing that Congress cannot abolish lower federal courts).

536. KRAMER, *supra* note 45, at 244.

537. *See supra* Part II–III.

538. *See supra* Part II.C.

539. *See supra* Part II.C.

throughout history.[540] In 1864, the First Geneva Convention laid out basic rules for caring for wounded soldiers.[541] International peace conferences in 1899 and 1907 led to various Hague Conventions, which codified and expanded the protections of the customary laws of war.[542] In 1945, the United Nations Charter sought to insure that international disputes would be settled peacefully.[543] Later Geneva Conventions codified additional rules to restrain warfare and protect prisoners of war, civilians, and wounded or sick members of the military.[544] Pursuant to these rules, anyone taken prisoner during war must be fed, clothed, provided medical treatment, and protected from physical harm.[545] Common Article 3 of the Geneva Conventions provides protections for noncombatants.[546] All of these principles of international law, designed to avoid unnecessary suffering and violence to combatants and civilians alike, occurred without input from the Judicial Branch.

Those who support judicial supremacy do not necessarily contend that the Court is more competent at interpreting the Constitution than the political branches, but instead desire a single interpretation that binds every branch.[547] These commentators feel uncomfortable with the open-endedness of a plurality of voices interpreting the Constitution, they want an authoritative voice.[548] In their article, Larry Alexander and Frederick Schauer argue in favor of judicial supremacy on the grounds that the function of law in general—and the Constitution in particular—is to stabilize society and declare the rights and duties of societal actors consistently and across time.[549] But judicial supremacy would not realize these goals.

540. *See* Brooks, *supra* note 185, at 687–96 (laying out the role of the Executive in declaring war and establishing national security law).

541. *Id.* at 689.

542. *Id.* (citing Hague Convention IV—Laws & Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277).

543. *Id.* (citing U.N. Charter art. 2, paras. 3–4).

544. *Id.*

545. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

546. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

547. *See, e.g.*, Alexander & Schauer, *supra* note 52, at 1377 ("The reasons for having laws and a constitution that is treated as law are accordingly also reasons for establishing one interpreter's interpretation as authoritative.").

548. *Id.*

549. *Id.* at 1371–77.

Even if the Supreme Court were the final authority on constitutional meaning, the Court has altered that meaning time and again by overruling or distinguishing clearly applicable constitutional decisions.[550] Thus, the Court has proved that precedent and stare decisis are insufficient restraints on judicial activism to realize these commentators' desired level of stability.

What is more, there is no reason to believe that the Judicial Branch's constitutional interpretations would likely provide greater stability in the law than the political branches' interpretations. The political branches' readings of constitutional norms have, if anything, remained more consistent over time. Again, military law provides an excellent example, not only because it is directly at issue in *Boumediene* but also because military matters have historically been cordoned off from judicial oversight. The Uniform Code of Military Justice and the Geneva and Hague conventions have provided stable and predictable rules governing armed conflict.[551] They have not lead to the "interpretive anarchy" that Alexander and Schauer fear.[552]

This Article does not advocate putting an end to judicial review.[553] Quite the contrary, judicial review plays an important

550. *Compare* Johnson v. Eisentrager, 339 U.S. 763, 790 (1950). (refusing to extend jurisdiction to German nationals convicted of carrying out military activities in China against the United States) *and Ex Parte McCardle*, 74 U.S. (7 Wall) 505, 515 (1868) (relying on Article III, Section Two to uphold congressional withdrawal of the Court's jurisdiction) *with* Boumediene v. Bush, 128 S. Ct. 2229, 2251–62 (2008) (extending habeas jurisdiction to detainees at Guantanamo Bay, Cuba). *Compare* Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (upholding congressional power to regulate access to the polls under the Fourteenth Amendment) *with Boerne*, City of Boerne v. Flores, 521 U.S. 531–36 (1997). (striking down the Religious Freedom Restoration Act as an unconstitutional use of congressional power).

551. *See generally* Corn and Jensen, *supra* 469, at 569 (discussing the constraints that the Uniform Code of Military Justice and the Geneva and Hague Conventions have placed on the government).

552. Alexander and Schauer, *supra* note 52, at 1379.

553. But others have. Mark Tushnet and Robert Bork, who stand at opposite ends of the political spectrum, both advocate that judicial review should end. Professor Tushnet has suggested this constitutional amendment: "The provisions of this Constitution shall not be cognizable by any court." TUSHNET, *supra* note 51, at 175. Robert Bork suggests something less extreme. He would permit judicial review and the Court's constitutional interpretation would bind the particular parties who appeared before the Court, but Congress could by majority vote overturn the Court's interpretation of the particular constitutional provision. ROBERT H. BORK, SLOUCHING TOWARD GOMORRAH 117 (1996). This author remains committed to the premise that the people are best protected where all three branches contribute their various perspectives and institutional strengths to constitutional interpretation. But how to retain judicial review while eliminating judicial supremacy? That is a problem outside the scope of this already lengthy article.

role in protecting constitutional norms. But the judicial power, like any other power, can be abused. The Constitution was designed to provide other branches the means to resist judicial manipulations of authority. The most flexible and effective constitutional check on the Judiciary is Congress's Article III power to regulate and make exceptions to the jurisdiction of the federal courts.[554] The constitutional system of checks and balances, designed to protect the people from governmental abuse of power, is more essential to the people's liberty interests than is federal habeas jurisdiction. Where Congress is convinced that the Court has attempted to alter the Constitution under the guise of interpreting it, Congress has an oath-sworn duty to uphold the Constitution and resist the abuse. The Constitution gave Congress the means by which to resist the Court's overreaching, by stripping it of jurisdiction.[555] In *Boumediene*, however, the Court refused to defer to Congress's check on its power. The Judicial Branch has claimed total dominion over constitutional interpretation, which is contrary to the Framers' best efforts to divide that awesome power among all the branches.

## V. CONCLUSION

Justice Kennedy ended his *Boumediene* opinion with this thought: "Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law."[556] His statement was correct. The individual's liberty and the community's security are precious constitutional values, each deeply worthy of protection, and where those values come into conflict, they must be reconciled within the constitutional framework. But Justice Kennedy's statement begs the real question: *Who* must reconcile them? For the *Boumediene* Court, it was the Court and the Court alone—the Court must "say what the law is"[557]—and Congress's attempt to deprive the Court of

554. U.S. CONST. art. III., § 2, cl. 2.
555. *Id.*
556. Boumediene v. Bush, 128 S. Ct. 2229, 2274–75 (2008).
557. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

jurisdiction to do so was a violation of "fundamental separation-of-powers principles."[558]

*Boumediene*'s understanding of the Court's role is sharply at odds with the Framers' vision—and the early Court's vision—of how the coordinate branches would operate within the constitutional system. The Framers designed the constitutional structure to ensure that no single branch would accumulate too much power. Thus, the Constitution created three perfectly coordinate branches of national government and delegated power, in widely varying amounts, to each. The Constitution did not grant any branch of government the final or exclusive right to declare constitutional meaning. It was instead an implied power, divided and shared among all branches. Because each enjoyed equal stature and rank, no branch could "pretend to an exclusive or superior right of settling the boundaries between their respective powers."[559]

Habeas corpus was indeed an important part of that constitutional framework, as Justice Kennedy said. It does not, however, give the Court license to overturn well-reasoned constitutional interpretations and policy decisions of the coordinate branches. When it became clear that the Court intended to issue habeas writs not to enforce but rather to radically alter settled constitutional understandings, Congress used its delegated and enumerated constitutional check on what it perceived to be the Court's abuses.

The Court's jurisdiction is not self-executing. Congress may grant it, and Congress may take it away. That power is Congress's most effective and flexible check to prevent the Court from overreaching its rightful sphere of influence, and in the MCA, Congress unambiguously stripped the Court's jurisdiction to entertain any claims, including petitions for habeas relief, from the Guantanamo detainees. The Court refused to be deterred. The Court claimed the power to review the constitutionality of Congress's check on the Court's *own* departures from constitutional norms and usurpations of coordinate branches' constitutional powers. The Court claimed irreducible jurisdiction, through the mechanism of habeas corpus review, to proclaim final answers to constitutional

558. *Boumediene*, 128 S. Ct. at 2253.

559. THE FEDERALIST No. 49 (James Madison), *supra* note 23, at 313.

questions. The Foundering Fathers would find it troubling that *Boumediene* did so in the name of separation of powers.

# NINTH CIRCUIT DISCRIMINATION CASE COULD CHANGE THE GROUND RULES FOR EVERYONE

SARAH KIRK*

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## I. INTRODUCTION

There is an important struggle underway in the Ninth Circuit over sex discrimination and the proper scope of Rule 23 of the Federal Rules of Civil Procedure in certifying a class action. Wal-Mart is returning to the Ninth Circuit to argue that a sex-discrimination lawsuit against it should not proceed as a class-action case covering more than 1.5 million women.[1] Wal-Mart argues that refusing to allow it to defend itself against the discrimination claims on an individual basis is a violation of due process that would also result in payouts to people who were not harmed. The plaintiffs argue for a class action theory that, if successful, would result in: (i) the balance of power shifting substantially in favor of employees and against employers and (ii) significant additional cost to United States businesses, employees, and consumers. The potential liability of all employers will shrink dramatically if Wal-Mart prevails and this expanded class-certification procedure is denied, requiring plaintiffs to proceed individually and actually show that the harm was done and the discrimination suffered in order to prove discrimination on the part of Wal-Mart.

The case began in 2001 when Betty Dukes, a fifty-four-year-old female and Wal-Mart employee from California filed a discrimination claim alleging that she was denied the training needed to obtain a higher-paying job, solely because she was a woman.[2] This lawsuit cites studies showing that female Wal-Mart workers earn 5%–15% less than their male counterparts in the same jobs—differences that could not be explained by seniority or performance reviews.[3] Wal-Mart denied the allegations of sex discrimination. In June of 2004, the California District Court issued an order certifying the proposed class as it related to issues of alleged discrimination, including liability for punitive damages as well as injunctive and declaratory relief; and concluded that statistical disparities in pay and promotion were enough to justify class treatment.[4] Wal-Mart appealed, contending that the court erred by "(1) concluding that the class met [Fed. R. Civ. Pro.] Rule 23(a)'s commonality and typicality requirements; (2) eliminating Wal-Mart's ability to

1. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 142 (N.D. Cal 2004).
2. *Id.* at 141.
3. *Id.* at 156.
4. *Id.* at 142–43.

respond to individual Plaintiff's claims; and (3) failing to recognize that Plaintiffs' claims for monetary relief predominated over claims for injunctive or declaratory relief."[5]

After a San Francisco federal district court judge granted class-action status,[6] the class grew to more than 1.6 million women who were employed at one or more of Wal-Mart's 3,400 stores across the U.S. on a salary or an hourly basis, with a range of positions including women who had worked at Wal-Mart since December 1998.[7] The plaintiffs' claim that thousands of local managers intentionally discriminated against these 1.6 million women in making literally millions of individualized, allegedly subjective, pay, training, and promotion decisions. The plaintiffs seek billions of dollars in back pay and punitive damages under Title VII of the Civil Rights Act of 1964.[8] These dollar amounts and the number of employees involved make the *Dukes* case the largest class action sexual discrimination case in the history of the United States.[9]

A three-member panel of the Ninth Circuit upheld the class status decision in 2007.[10] Wal-Mart asked for a rehearing, arguing that even if the plaintiffs prevail in getting class certification, punitive damages and back pay must be awarded on an individual basis rather than in the aggregate. The Ninth Circuit agreed to revisit the case en banc,[11] which was heard by eleven members of the twenty-four judge Ninth Circuit Court of Appeals on March 31, 2009.[12]

If the Ninth Circuit does not reverse the three-member panel and correct this class certification, the Supreme Court will likely intervene. The *Dukes* decision is important because the district court's order certifying the proposed class is more permissive than most labor/discrimination class-action decisions. True, some courts have certified some of these labor class-action cases more freely than precedents in other fields of law allow.[13]

5. Dukes v. Wal-Mart Stores, Inc., 509 F.3d 1168, 1175 (9th Cir. 2007).

6. *Dukes*, 222 F.R.D. at 143.

7. *Id.* at 142.

8. 42 U.S.C. § 2000 (1964).

9. Alexandria Sage, *Wal-Mart Sex Discrimination Case Back in Court*, REUTERS, Mar. 25, 2009, http://www.reuters.com/article/topNews/idUSTRE52O0P820090325.

10. *Dukes*, 509 F.3d at 1168.

11. Dukes v. Wal-Mart, Inc., 556 F.3d 919, 919 (9th Cir. 2009).

12. Ninth Circuit Court, Pending En Banc Cases 4 (2009) http://www.ca9.uscourts.gov/datastore/enbanc/2009/10/14/10-12-09.pdf.

13. Molski v. Gleich, 318 F.3d 937 (9th Cir. 2003); Robinson v. Metro-North

However, this labor class-action exception does nothing to advance judicial efficiency. Rather, it simply creates a gigantically burdensome and threatening legal weapon useful only in coercing big settlements and bountiful plaintiff bar legal winnings regardless of the merits of the individual claims. The Supreme Court's class-action decisions, however, cut in a more conservative direction.[14] One would think that the current Roberts' Court would want to settle these differences between the circuits and between labor and other areas of the law sooner rather than later. Usually, the stories involved in these cases have little in common with each other and each claim would require a full trial on its own merits to reach the fact-intensive questions about motivation, facts and circumstances, and adverse impact involved.[15] In such cases, the plaintiffs' lawyer usually attempts to argue the case to a jury using broad generalities in order to get some sweeping condemnation of the "atmosphere" of the employer, using isolated cases of bad facts to generate even worse law, and offering some expert's opinion that all plaintiffs were adversely affected by the discriminatory culture. It is virtually impossible to defend against abstract claims of that kind; there is just not an effective defense and hence the battle becomes one-sided. Federal Rule of Civil Procedure 23 was not intended to water down an individual's

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Commuter R.R. Co., 267 F.3d 147 (2d Cir. 2001); Caridad v. Metro-North Commuter R.R., 191 F.3d 283 (2d Cir. 1999).

14. Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997); Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147 (1982).

15. *See* Int'l Bhd. Of Teamsters v. United States, 431 U.S. 324, 361–62 (1977) (where plaintiffs seek individual monetary relief, a district court must conduct individualized hearings at which an employer "can demonstrate that the individual applicant was denied an employment opportunity for lawful reasons"); Love v. Johanns, 439 F.3d 723, 729 (D.C. Cir. 2006) (noting that the plaintiffs' claims "differ widely, and . . . are interspersed with nondiscriminatory evidence and innocuous explanations," the court found that while each plaintiff had standing to bring an individual lawsuit, they could not gather together their very different fact patterns into a common claim by "[t]he bald allegation that [they] . . . are unified by a 'common policy' of gender discrimination"); Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 318–24 (4th Cir. 2006) (affirming denial of class certification because a statute of limitations defense required "individualized adjudication," and emphasizing that "to protect . . . the right of the defendant to present facts or raise defenses that are particular to individual class members, district courts must conduct a 'rigorous analysis' to ensure compliance with Rule 23" (quoting *Gen. Tel. Co.*, 457 U.S. at 161)); Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 651 (6th Cir. 2006) ("[I]n a Title VII case, whether the discriminatory practice actually was responsible for the individual class member's harm, the applicability of nondiscriminatory reasons for the action, showings of pretext, and any affirmative defense all must be analyzed on an individual basis."); *In re* Allstate Ins. Co., 400 F.3d 505, 508 (7th Cir. 2005) (reversing 23(b)(2) certification based in part on the prospect of "more than a thousand individual hearings" on entitlement to damages).

substantive legal rights or defenses, but that is precisely the result of these inappropriate class certifications.[16] In fact, the new rules allow an immediate interlocutory appeal when a class is certified in recognition of the fact that a class certification almost always dictates the outcome in these cases—a forced settlement.[17]

There is also a new player on the scene that may tip the balance of power. Until now, the Equal Employment Opportunity Commission (EEOC) has not been involved. However, this has changed since the Obama Administration took office. On March 19, 2009, the EEOC filed an amicus brief in support of Betty Dukes and the plaintiffs.[18] In its amicus brief, the EEOC does not defend the district court's class-certification order *in toto*, but the EEOC does support the argument that a claim seeking billions of dollars in punitive damages and back pay may be decided on a class basis without individual hearings.[19] Specifically, the EEOC now argues that it is appropriate to impose substantial monetary damages on companies without giving them an opportunity to demonstrate that their employees were treated fairly.

## II. CASELAW AFTER *DUKES*

Almost five years have passed since the district court certified the class in the *Dukes* case. Since that time, federal courts of appeals have decided numerous cases that directly undermine the most critical elements of the district court's certification analysis.[20] This intervening case law makes it plain that, whatever its possible merit in 2004, the district court's certification decision in *Dukes* is now wrong as a matter of law. In the past five years, federal courts have clarified principles that confirm that the district court's Rule 23 analysis was manifestly

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16. FED. R. CIV. P. 23.

17. *Id.*

18. Brief for Equal Employment Opportunity Commission as Amicus Curiae Supporting Plaintiffs on Rehearing En Banc, Dukes v. Wal-Mart, Inc., 556 F.3d 919 (2009) (No. 04-16720), 2009 WL 872875.

19. *Id.*

20. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008); *Thorn*, 445 F.3d 311; *Reeb*, 435 F.3d 639; Browning v. Dep't of the Army, 436 F.3d 692 (6th Cir. 2006); Bell v. Ascendant Solutions, Inc., 422 F.3d 307 (5th Cir. 2005); Unger v. Amedisys, Inc., 401 F.3d 316 (5th Cir. 2005); *In re* Allstate Ins. Co., 400 F.3d 505 (7th Cir. 2005).

erroneous in at least four critical respects: (1) the court failed to subject *Dukes*' class-certification arguments to rigorous scrutiny, simply because doing so would have required some examination into the merits of plaintiffs' claims; (2) the court applied the wrong standards in assessing Federal Rule of Civil Procedure 23's commonality requirement and improperly invoked the concept of "excessive subjectivity" to find that requirement to be satisfied; (3) the court incorrectly declined to subject the plaintiffs' expert testimony to the admissibility analysis of *Daubert v. Merrell Dow Pharms., Inc.*[21] and mistakenly failed to weigh that testimony against the contrary testimony of Wal-Mart's experts; and (4) the court erred by certifying, under Rule 23(b)(2), an unmanageable class in which claims for declaratory and injunctive relief plainly do not predominate.

In conducting its Rule 23 analysis, the district court failed to subject the plaintiffs' claims to rigorous scrutiny.[22] To justify this refusal, the court relied heavily on the Second Circuit's opinion in *Caridad*, which, the court reasoned, stood for the proposition that a court should not examine the merits of the claims at the class-certification stage.[23]

This refusal to scrutinize the plaintiffs' claims was incorrect. As courts have consistently recognized, a district court must subject the plaintiffs' class claims to rigorous scrutiny, even if such an inquiry overlaps with the merits.[24] In perhaps the most thorough discussion of this issue to date, the Fifth Circuit explained that the decision to certify a class calls for findings by the court, not merely for a threshold showing by a party, that each requirement of Rule 23 is met.[25]

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21. 509 U.S. 579 (1993).

22. *E.g.*, Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 142, 144, 153–55, 159–60, 164–66 (N.D. Cal 2004).

23. *Id.* at 155 n.21, 159 n.29.

24. *In re* IPO Sec. Litig., 471 F.3d 24, 42 (2d Cir. 2006) (expressly disavowing relevant parts of *Caridad*); Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219, 232 (2d Cir. 2006) (noting that a number of other circuits have determined more broadly than *Caridad* that "an inquiry into the merits of a claim is appropriate to the extent necessary to determine whether the requirements of Rule 23 have been met."); Bowe v. PolyMedica Corp., 432 F.3d 1, 5 (1st Cir. 2005) (agreeing with the majority of courts of appeals that on class certification, a district court should "make whatever legal and factual inquiries are necessary to an informed determination of the certification issues").

25. *See* Oscar Private Inv. v. Allegiance Telecom, Inc., 487 F.3d 261, 268 (5th Cir. 2007) (holding that a district court "must give full and independent weight to each Rule 23 requirement, regardless of whether that requirement overlaps with the merits").

The district court applied the wrong standards in assessing Rule 23's commonality requirement when the court stated that the necessary showing to satisfy commonality is minimal. Courts of appeals have repeatedly rejected this assertion, holding instead that plaintiffs who seek class certification must make a significant showing of commonality.[26] Here, Dukes has failed to make such a showing: the record established that women at Wal-Mart were promoted and demoted for a variety of different reasons, including individual performance issues.

Moreover, the court improperly invoked the concept of "excessive subjectivity" to find that the commonality requirement was satisfied. The district court simply erred in finding that the commonality requirement was satisfied in part based on the concept of "excessive subjectivity." As the Supreme Court has held, and as Wal-Mart has argued consistently, the mere presence of subjectivity in an employer's decision-making processes does not, in itself, raise an automatic inference of discriminatory conduct.[27] As a result, the notion that a decision-making process can be suspect because it contains "too much" subjectivity is just plain wrong, as no amount of subjectivity can be *per se* "excessive."

Further, the district court was incorrect to conclude that Wal-Mart's compensation and promotion policies consistently permit managers to utilize a great deal of subjectivity and thus support a finding of commonality. In fact, courts have rejected the argument that a common policy of discrimination exists whenever significantly subjective decision-making operates on a national basis with discriminatory results.[28] Instead, courts have recognized that establishing commonality for a disparate treatment class is particularly difficult "where, as here, multiple decisionmakers [sic] with significant local autonomy exist."[29]

The presence of subjectivity in this case cuts sharply *against* a finding of commonality, as evidenced by the number of different subjective decision-makers involved in many different locations, over many different years, dealing with many different

26. *E.g.*, Garcia v. Johanns, 444 F.3d 625, 632 (D.C. Cir. 2006) (holding that the plaintiff must "make a significant showing [of commonality] to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the defendant's challenged employment decisions") (citation omitted).

27. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988).

28. *Garcia,* 444 F.3d at 632.

29. *Id.*

facts and circumstances.[30] In the *Dukes* case, the putative class members were not exposed to the subjective judgments of the same decision-maker, but instead worked under *thousands* of *different* managers in *thousands* of *different* stores across the country. In such a situation, any finding of commonality would be difficult at best.[31]

The district court erred in its treatment of expert evidence in at least two respects. First, it accepted the plaintiffs' aggregated nationwide statistics without giving weight to Wal-Mart's disaggregated store-by-store statistical evidence. In so doing, the district court made the precise error the Third Circuit unequivocally warned against in *Hydrogen Peroxide*, where the court admonished that "[w]eighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands."[32] Courts simply may not decline to resolve a genuine legal or factual dispute—including a dispute among experts—"because of concern for an overlap with the merits."[33] Other courts now uniformly agree that a district court must weigh *all* competing evidence and cannot ignore the evidence submitted by the defendant.[34] Indeed, commentators have concluded that aggregated statistics—like those offered by the plaintiffs—*cannot* provide persuasive evidence of commonality in a multiple-facility class action like this one.[35]

Second, the district court erred in refusing to analyze the admissibility of the plaintiffs' expert sociological evidence under *Daubert*. Since the district court's opinion was issued, multiple

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30. *See* Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 159 (1982) (finding that, even in a single facility, there was a wholly subjective decision-making process and "[i]f one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action. [There is] nothing in the statute to indicate that Congress intended to authorize such a wholesale expansion of class-action litigation").

31. *See Garcia*, 444 F.3d at 632 (holding that denial of class certification of Hispanic loan applicants with varied eligibility criteria in over 2,700 counties nationwide over a twenty-year period based on the geographic spread of the local decision-makers was not an abuse of discretion).

32. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 323 (3d Cir. 2008).

33. *Id.* at 324; *See also id.* at 312–15, 325 (analyzing defendants' expert's rebuttal to plaintiffs' expert's testimony).

34. *E.g.*, Stuebler v. Xcelera.com, 430 F.3d 503, 512 (lst Cir. 2005); Blades v. Monsanto Co., 400 F.3d 562, 575 (8th Cir. 2005).

35. *E.g.*, Daniel S. Klein, Note, *Bridging the Falcon Gap: Do Claims of Subjective Decisionmaking in Employment Discrimination Class Actions Satisfy Rule 23(A) Commonality and Typicality Requirements*, 25 REV. LITIG. 131, 165–76 (2006).

federal courts of appeals have made it clear that district courts must evaluate the admissibility of expert evidence and apply rigorous standards of proof even at the class-certification stage.[36] In *Hydrogen Peroxide*, for example, the Third Circuit made it clear that expert opinions with respect to class certification, like any matter relevant to a Rule 23 requirement, called for rigorous analysis.[37] Opinion testimony should not be uncritically accepted as meeting a Rule 23 requirement merely because the court holds that the testimony should not be excluded under *Daubert* or for any other reason; rather, the court must consider its persuasiveness, and the persuasiveness of testimony from any opposing experts, as it decides whether Rule 23 is satisfied.[38]

And it is clear that the sociological evidence that the plaintiffs offered—the "social framework analysis" provided by Dr. William Bielby—would not stand up to this kind of scrutiny. Even the founders of social framework analysis, upon whose research Dr. Bielby relied, concluded that his testimony "in *Dukes* . . . clearly exceeds the limits of proper social framework testimony" and should have been excluded.[39]

Decisions issued since the *Dukes* class was certified expose the district court's clear error in certifying a class under Rule 23(b)(2) in a case in which the potential punitive damages amount to *billions* of dollars and injunctive or declaratory relief are entirely unavailable.[40] It is undisputed that Rule 23(b)(2) does not extend to cases in which the appropriate final relief relates predominantly to money damages.[41]

A split has developed among circuits on how a court determines whether monetary relief predominates in a Rule 23(b)(2) class suit.[42] Following the Fifth Circuit's lead in *Allison v. Citgo Petroleum, Corp.*,[43] at least five circuits have adopted an incidental damages test, which prohibits certification under

36. *E.g.*, Bell v. Ascendant Solutions, Inc., 422 F.3d 307, 311–14 (5th Cir. 2005); *See also*, Unger v. Amedisys, Inc., 401 F.3d 316, 319 (5th Cir. 2005).

37. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 323.

38. *Id.*

39. John Monahan et al., *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 VA. L. REV. 1715, 1745 (2008).

40. *E.g.*, Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 331 (4th Cir. 2006).

41. *See* FED. R. CIV. P. 23 Advisory Committee's note to 1966 amend.; *See also Thorn*, 445 F.3d 311, 331 ("Rule 23(b)(2) . . . authorizes class treatment only when the plaintiff seeks predominantly 'injunctive' or 'declaratory' relief.").

42. Richards v. Delta Air Lines, Inc., 453 F.3d 525, 531 n.8 (D.C. Cir. 2006).

43. 151 F.3d 402 (5th Cir. 1998).

Rule 23(b)(2) where plaintiffs seek monetary relief unless the relief sought will "flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief."[44]

The Ninth Circuit, however, has expressly refused to adopt the approach set forth in *Allison*, rejecting the incidental damages test or any "particular bright-line rule"—in an abrupt shift from a previously consistent line of cases, the Ninth Circuit panel's second decision in *Molski* endorsed the ad hoc approach adopted by the Second Circuit in *Robinson*.[45] Since *Molski*, no other circuit has adopted this approach, and the Second Circuit, in *In re IPO* disavowed *Robinson* and the line of Second Circuit cases to which it belongs.[46]

## III. *DUKES* SHOULD NOT BE CERTIFIED AS A CLASS ACTION

In *Dukes*, under any standard, the conclusion that declaratory and injunctive relief predominate is simply untenable. All but two plaintiffs in this case are no longer Wal-Mart employees, and thus do not even have standing to seek declaratory or injunctive relief.[47] Back pay is not a form of "declaratory or injunctive"

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44. *Id.* at 415; *See* Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 649–50 (6th Cir. 2006); *In re* St. Jude Med., Inc., 425 F.3d 1116, 1121 (8th Cir. 2005); *Thorn*, 445 F.3d at 330 n.25; Cooper v. S. Co., 390 F.3d 695, 720 (11th Cir. 2004); Lemon v. Int'l Union of Operating Eng'rs, 216 F.3d 577, 580–81 (7th Cir. 2000).

45. Molski v. Gleich, 318 F.3d 937, 950 (9th Cir. 2003).

46. Reeb v. Ohio Dep't of Rehab. & Corr., 81 Fed. Appx. 550, 554 (6th Cir. 2003) ("[W]e . . . decline to determine on this record the proper standard for class certification under Rule 23(b)(2) where plaintiffs seek monetary as well as equitable relief."); McManus v. Fleetwood Enters., Inc., 320 F.3d 545, 552 (5th Cir. 2003) ("Certification under Rule 23(b)(2) is appropriate where 'the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole"); Coleman v. Gen. Motors Acceptance Corp., 296 F.3d 443, 446 (6th Cir. 2002) ("This court has not explicitly addressed the question of whether compensatory damages are recoverable by a Rule 23(b)(2) class."); Hohider v. United Parcel Serv., Inc., 243 F.R.D. 147, 236 (W.D. Pa. 2007) ("The incidental damages approach, however, has been rejected by courts of appeals in at least two circuits in part because those courts of appeals reason that it amounts to a *per se* prohibition of the recovery of compensatory damages in Title VII antidiscrimination Rule 23(b)(2) class action lawsuits and strips district courts of discretion traditionally vested in them under Rule 23."); Thompson v. Merck & Co., Inc., No. C.A. 01-1004, 2004 WL 62710, at *4 (E.D. Pa. Jan. 6, 2004) ("Such damages, awarded on the basis of intangible injuries and interests, are uniquely dependent on the subjective and intangible differences of each class member's individual circumstances.").

47. *See, e.g.*, Summers v. Earth Island Inst., 129 S. Ct. 1142, 1149 (2009) (discussing standing in class-action certifications).

relief capable of supporting certification under Rule 23(b)(2).[48] The panel's first opinion in *Molski* cited *Allison* approvingly and held that under Ninth Circuit precedent, injunctive and declaratory relief do not predominate, and a class is therefore not certifiable under Rule 23(b)(2) unless monetary damages are merely "incidental" as defined in *Allison*.[49] It was only on rehearing that the panel withdrew its first opinion and issued an amended opinion that expressly rejected *Allison* and adopted the subjective test articulated by *Robinson*.[50]

The Fourth Circuit recently found that 23(b)(2) certification is "improper when the predominant relief sought is not injunctive or declaratory, even if the relief is equitable in nature."[51] And, perhaps most obviously, the massive amount of monetary punishment that the plaintiffs seek in *Dukes* flatly invalidates any claim that pecuniary claims are "incidental" to their case or that their requests for injunctive relief are predominant. The due process concerns raised whenever 23(b)(2) certification involves monetary relief[52] are heightened where, as here, a plaintiff class seeks penalties.[53]

Recent decisions also highlight the district court's error in failing to recognize the insurmountable manageability problems presented by trying to resolve the liability and damages claims in the putative 23(b)(2) class.[54] This class already included 1.5 million women over a five year period when it was certified in 2004. Now, in 2009, the class has vastly expanded, and is still growing, as are the potential damages. Furthermore, determination of punitive damages is an inherently particularized inquiry that is not susceptible to class-wide determination giving rise to the need for tens of thousands, if

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48. *Allison*, 151 F.3d at 415 ("The underlying premise of the (b)(2) class . . . 'begins to break down when the class seeks to recover back pay or other forms of monetary relief to be allocated based on individual injuries.'") (citing Eubanks v. Billington, 110 F.3d 87, 95 (D.C. Cir. 1997)).

49. Molski v. Gleich, 307 F.3d 1155,1167–68 (9th Cir. 2002), *withdrawn*, No. 00-57099, 2003 U.S. App. LEXIS 2055 (9th Cir. 2003).

50. Molski v. Gleich, 318 F.3d 937, 949–50 (9th Cir. 2003) (citing Robinson v. Metro-North Commuter Railroad Co., 267 F.3d 147, 163–64 (2d Cir. 2001)).

51. Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 331 (4th Cir. 2006).

52. Lemon v. Int'l Union of Operating Eng'rs, 216 F.3d 577, 581 (7th Cir. 2000).

53. *Allison*, 151 F.3d at 418 (finding that punitive damages are non-incidental—requiring proof of how harm was inflicted on each plaintiff, introducing new and substantial legal and factual issues, and not being capable of computation by reference to objective standards).

54. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 319–20 (3d Cir. 2008).

not millions, of individualized hearings to determine eligibility for damages. Since the district court issued its opinion, federal courts of appeals have recognized that the manageability problems presented by analogous—though far smaller and less unwieldy—classes are insurmountable.[55]

The district court's class-certification order should also be reversed because its proposed trial plan would violate the requirements of due process, Title VII, and the Rules Enabling Act inasmuch as the proposed trial plan purports to eliminate Wal-Mart's right to present individualized defenses at trial.[56] It is well established that every employer is entitled to put on evidence showing that particular plaintiffs are not entitled to relief because they were "denied an employment opportunity for lawful reasons."[57]

Under the district court's decision, however, plaintiffs will be permitted to proceed directly from demonstrating a prima facie case of class-wide discrimination based on statistical and anecdotal evidence to a "remedy phase" that addresses injunctive relief and calculates back pay pursuant to a "formula"—all without the individualized hearings required by *Teamsters*.[58] The district court's trial plan thus affords Wal-Mart no opportunity whatsoever to put on individualized evidence in its defense.

The alternative "procedure" proposed in the Ninth Circuit panel's revised opinion would similarly deny Wal-Mart this fundamental right. In that opinion, the Ninth Circuit panel suggests that the unprecedented procedure discussed in *Hilao v. Estate of Marcos*[59] could be used to try this case.[60] According to the panel, the *Hilao* plan "would allow Wal-Mart to present individual defenses in the randomly selected 'sample cases'

55. *See, e.g.*, *In re* Allstate Ins. Co., 400 F.3d 505, 508 (7th Cir. 2005) (reversing 23(b)(2) certification based in part on the prospect of more than a thousand individual hearings on entitlement to damages); *In re* St. Jude Med., Inc., 425 F.3d 1116, 1121–22 (8th Cir. 2005) (recognizing that 23(b)(2) classes must be cohesive).

56. 28 U.S.C. § 2072(a)-(b) (2006).

57. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 362 (1977); *see also* Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 148 (2000) (finding that an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision).

58. Dukes v. Wal-Mart Stores, Inc., 509 F.3d 1168, 1190 n.16 (9th Cir. 2007); Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 174–78 (N.D. Cal 2004).

59. 103 F.3d 767, 782–87 (9th Cir. 1996).

60. *Dukes*, 509 F.3d at 1191–93.

. . . ."[61] Setting aside the myriad problems in the *Hilao* decision, *Teamsters* alone requires that an employer have the right to present rebuttal evidence as to *each individual* seeking relief, which the panel's proposal does not permit.[62] This evident disregard of a defendant's right to present individualized defenses in both the district court's and the panel's trial plans violates Title VII, *Teamsters*, and fundamental principles of due process.[63] Furthermore, because these plans would impose liability for employment decisions Wal-Mart could readily defend if the claims were brought in individual actions, they would fundamentally alter the substantive rights and burdens that would otherwise arise in an individual action. That is impermissible under the Rules Enabling Act, which provides that general rules of practice and procedure—such as the class-action device—"shall not abridge, enlarge or modify any substantive right."[64]

This conclusion is confirmed by the Second Circuit's recent decision in *McLaughlin v. Am. Tobacco Co.*,[65] which rejected a proposed aggregated method for awarding damages to a class of tobacco users. In that case, the district court's trial plan called for the total number of class members injured and the total amount of damages to be determined in a single class-wide adjudication, and then for individual damages to be awarded

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61. *Id.* at 1192 n.22.

62. *See Teamsters*, 431 U.S. at 361–62 (where plaintiffs seek individual monetary relief, a district court must conduct individualized hearings at which an employer can demonstrate that the "individual applicant was denied an employment opportunity for lawful reasons"); Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 651 (6th Cir. 2006) ("When determining whether the discriminatory practice in a Title VII case "was responsible for the individual class member's harm, the applicability of nondiscriminatory reasons for the action, showings of pretext, and any affirmative defense all must be analyzed on an individual basis."); Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 318–24 (4th Cir. 2006) (affirming denial of class certification because a statute of limitations defense required "individualized adjudication," and emphasizing that "to protect . . . the right of the defendant to present facts or raise defenses that are particular to individual class members, district courts must conduct a 'rigorous analysis' to ensure compliance with Rule 23 . . .").

63. *See, e.g.*, Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) (due process requires that a defendant have an opportunity to present every available defense); Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 3–10, *Philip Morris USA*, 549 U.S. 346 (2007) (No. 05-1256), 2006 WL 2153777; *See also id.* at 12–14 (explaining that both the district court's and the panel's decisions would encourage employers to adopt the kinds of quota-like polices that Title VII was enacted to prevent).

64. 28 U.S.C. §§ 2072(a)–(b) (2006).

65. 522 F.3d 215, 220 (2d Cir. 2008).

through a "simplified proof of claim procedure."[66] As the Second Circuit explained, "such an aggregate determination is likely to result in an astronomical damages figure that does not accurately reflect the number of plaintiffs actually injured by defendants and that bears little or no relationship to the amount of economic harm actually caused by defendants."[67] As such, the Second Circuit concluded that the plan offended the Rules Enabling Act and violated due process.[68]

In the *Dukes* case, the district court opined that Wal-Mart was not entitled to individualized hearings because its allegedly discriminatory decisions were "largely subjective."[69] As a result, the district court reasoned, it would be "virtually impossible" to determine which actions were, in fact, discriminatory. Thus, there would be "little point in going through the exercise of individual hearings."[70] Numerous federal courts of appeals have since rejected the misplaced notion that subjective decision-making alone is sufficient to deprive defendants of their right to present individualized defenses.[71]

Finally, even if individualized hearings are not required for Title VII injunctive relief and back pay, they are indisputably required for punitive damages.[72] Accordingly, the district court plainly erred in concluding that such damages could be awarded absent an individualized determination of entitlement to relief.

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66. *Id.* at 231.

67. *Id.*

68. *Id.* at 231–32.

69. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 176–77 (N.D. Cal. 2004).

70. *Id.*

71. *See* Browning v. Dep't of the Army, 436 F.3d 692, 696–97 (6th Cir. 2006) (holding that plaintiffs must demonstrate both a discriminatory motive on the part of the employer and a "reliance on subjective matrix criteria does not support an inference of discrimination."); Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 769 (11th Cir. 2005) (showing subjective evaluations are "properly articulated as part of the employer's burden to produce a legitimate race-neutral basis for its decision."); Green v. New Mexico, 420 F.3d 1189, 1195 (10th Cir. 2005) ("[W]e have consistently recognized that such criteria 'must play some role' in certain management decisions and accordingly have reviewed the use of subjective factors on a case-by-case basis.").

72. *See* Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) (finding punitive damages may not be imposed unless the defendant has an "opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary"); *In re* Simon II Litig. v. Phillip Morris USA, Inc., 407 F.3d 125, 139 (2d Cir. 2005) (recognizing that due process counsels against imposing punitive damages for acts of a "broad . . . scope" with respect to a class of plaintiffs).

The EEOC's brief is in direct conflict with the federal government's own defense against discrimination suits. The class action against Wal-Mart was certified under a provision of the law that allows for injunctive relief, not for large monetary awards. Class claims for monetary relief must meet a higher standard to be certified, consequently, one of Wal-Mart's arguments is that the plaintiffs are seeking billions of dollars in damages while they never met the more rigorous threshold for class certification. The EEOC's amicus brief never mentions that the federal government has successfully defended itself in the past by making the same argument as Wal-Mart does.[73] Apparently, the EEOC would allow the government to play by a set of rules that are off limits to private companies trying to defend themselves against massive class actions.

## IV. CONCLUSION

In summary, employers are watching closely as Wal-Mart awaits a ruling from the Ninth Circuit. If Wal-Mart should lose, the impact will be dramatic on employers, employees, and consumers, and have substantial and deep-reaching unintended consequences. The EEOC has changed course and now supports the notion that a claim seeking billions of dollars in punitive damages and back pay may be decided on a class basis without individual hearings that would permit a company to defend itself. The *Dukes* decision is important because the district court's class-certification order certifying the proposed class is more permissive than most labor and discrimination class-action decisions. It is important for the Roberts' Court to settle the existing differences between the circuits as well as the differences between labor and other areas of law in the very near future. If this struggle ends by permitting class-actions that impose huge monetary and punitive damages on companies without giving the companies an opportunity to demonstrate that the employees were treated fairly across multiple stores, with multiple managers, and involving multiple facts and circumstances, employment growth will slow, outsourcing will increase, and form over substance will acquire an entirely new

73. Brief for Equal Employment Opportunity Commission as Amicus Curiae in Support of Plaintiff, Dukes v. Wal-Mart, Inc, 556 F.3d 919 (9th Cir. 2009) (No. 04-16688), 2009 WL 872875.

meaning. The *Dukes* case should reach the Supreme Court. In the meantime, we will likely experience a jarring ride with regard to employment, labor and discrimination litigation, and regulation.

# CASES, CONTROVERSIES, AND THE TEXTUALIST COMMITMENT TO GIVING EVERY WORD OF THE CONSTITUTION MEANING

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ABSTRACT

*Textualists contend that every word of the Constitution must be given meaning and that none should be read as surplusage. But no one takes that rule seriously when it comes to Article III as no scholar has put forward a satisfactory interpretation of Article III that distinguishes between the terms "cases" and "controversies." This Note begins by exploring and criticizing the current theories for distinguishing between "cases" and "controversies." Concluding that none is satisfactory, it undertakes an intratextual analysis of "cases" and "controversies" in Article III, and puts forward novel definitions of the terms. This Note reveals for the first time that the terms' definitions overlap. The importance of these terms becomes clear once their definitions are extrapolated into a novel theory of Supreme Court jurisdiction one that undermines Professor Akhil Reed Amar's vision of the Original Jurisdiction Clause. It also points out a rare discovery an instance of Professor Amar, the normally careful textualist, misquoting the Constitution when discussing these terms. Rather than overlook Professor Amar's misquotation, which in other circumstances might be viewed as a meaningless scrivener's error, this Note shows it to be a prime illustration of how Professor Amar and other commentators fail to give a separate meaning to both "cases" and "controversies." The Note then goes on to explain how a proper understanding of the terms "cases" and "controversies" clarifies the distinction between "mandatory-tier" and "discretionary-tier" disputes that Professor Amar famously put forward. It concludes that this analysis compels rejection either of Professor Amar's view of the Supreme Court's jurisdiction or of the textualist rule that each word of the Constitution is to be given meaning.*

In arguing for his two-tiered theory of federal jurisdiction,[1] Professor Akhil Reed Amar writes that "each word of the Constitution is to be given meaning; no words are to be ignored

1. *See generally,* Akhil Reed Amar, *Taking Article III Seriously: A Reply to Professor Friedman,* 85 NW. U. L. REV. 442 (1991) [hereinafter *Reply to Friedman*]; Akhil Reed Amar, *Reports of My Death are Greatly Exaggerated: A Reply,* 138 U. PA. L. REV. 1651 (1990) [hereinafter *Reply*]; Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789,* 138 U. PA. L. REV. 1499 (1990) [hereinafter *Judiciary Act*]; Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction,* 65 B.U. L. REV. 205 (1985) [hereinafter *Two Tiers*].

as mere surplusage."[2] He and the vast majority of constitutional scholars fail, however, to distinguish between the terms "cases" and "controversies"[3] in Article III[4] and thereby fail to give each word of the Constitution meaning. According to Professor Amar's two-tiered theory, Congress may remove "discretionary-tier" disputes from the jurisdiction of the federal courts, but it may not remove "mandatory-tier" disputes.[5] Using Professor Amar's intratextualist interpretive techniques, and staying within his two-tiered theory, this Note puts forward a new interpretation of the terms "cases" and "controversies" and explains how the current imprecise interpretation of those two terms causes even careful textualists like Professor Amar to misunderstand and even misquote the Original and Appellate Jurisdiction Clauses.

Part I is an intratextual analysis[6] of the terms "cases" and "controversies" in Article III.[7] That analysis gives rise to definitions of the terms "cases" and "controversies" that are specific to Article. III.[8] Applying those definitions to the Original and Appellate Jurisdiction Clauses, Part II shows that, contrary to received wisdom, Amar's mandatory-tier disputes comprise the entirety of the Supreme Court's jurisdiction.[9] In Part III this intratextual analysis reveals a criticism of Amar's theory[10] that the Supreme Court's original jurisdiction is

2. *Two Tiers*, *supra* note 1, at 242 (citing *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 334 (1816) ("It is hardly to be presumed that the variation in the language could have been accidental."); *cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.").

3. There are two dominant but unsatisfactory theories distinguishing "cases" from "controversies," but scholars do not adhere to either theory rigorously. Instead, "cases" and "controversies" are often used interchangeably. *See infra* notes 29–30 and accompanying text.

4. U.S. CONST. art. III.

5. *See Two Tiers*, *supra* note 1, at 208–10:

> In the first tier, comprising federal question, admiralty, and public ambassador cases, federal jurisdiction is mandatory: the power to hear all such cases must be vested in the federal judiciary as a whole. In the second tier, comprising categories of cases less critical per se to smooth national government, federal jurisdiction is discretionary with Congress.

6. For a thorough discussion of intratextualism, see Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) [hereinafter *Intratextualism*].

7. U.S. CONST. art. III.

8. *See infra* notes 14–69 and accompanying text.

9. *See infra* notes 70–90 and accompanying text.

10. *See infra* notes 91–125 and accompanying text.

comprised partly of discretionary-tier lawsuits.[11] More importantly, it explores the extent to which he—like most other scholars—does not distinguish between "cases" and "controversies."[12] Part IV concludes by considering the practical effects this argument might have both on theories of Supreme Court jurisdiction and constitutional interpretation.[13]

## I. THE INTRATEXTUAL ANALYSIS

This Part briefly explains the conceptual tools used in later sections, namely, Professor Amar's two-tiered theory[14] and his intratextualist[15] interpretive techniques. Second, it performs an intratextualist analysis of the terms "cases" and "controversies" in Article III.[16] Finally, it explains how this analysis proves that some "cases" are also "controversies" and vice versa.

### A. *Professor Amar's Two-Tiered Theory*

Professor Amar argues that there are two tiers of federal jurisdiction—mandatory and discretionary.[17] Article III[18] defines the federal judicial power.[19] It distributes that defined jurisdiction among nine legal dispute categories. These categories appear in Article III, Section Two, which reads as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting

11. *See* Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 444 ("Congress does have authority . . . to reduce or even to eliminate the Supreme Court's original jurisdiction over lawsuits 'in which a State shall be Party.'") [hereinafter *Section 13*].

12. *See supra* notes 126–42 and accompanying text.

13. *See supra* notes 143–48 and accompanying text.

14. *See* sources cited *supra* note 1.

15. *See* sources cited *supra* note 6.

16. U.S. CONST. art. III.

17. *See Two Tiers*, *supra* note 1, at 208–10:

> In the first tier, comprising federal question, admiralty, and public ambassador cases, federal jurisdiction is mandatory: the power to hear such cases must be vested in the federal judiciary as a whole. In the second tier, comprising categories of cases less critical per se to smooth national government, federal jurisdiction is discretionary with Congress.

18. U.S. CONST. art. III.

19. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 1 (5th ed. 2007) ("Article III of the United States Constitution creates the federal judiciary and defines its powers.").

> Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[20]

The first three categories, which are referred to as "cases" and are preceded by "all," are (1) federal question "cases," (2) ambassador "cases," and (3) admiralty "cases."[21] The last six categories, which are called "controversies" and are not preceded by "all," are "controversies" (4) to which the United States shall be a party, (5) between two or more states, (6) between a state and citizens of another state, (7) between citizens of different states, (8) between citizens of the same state claiming lands under grants of different states, and (9) between a state, or the citizens thereof, and foreign states, citizens or subjects.[22]

While a wide variety of other evidence supports Professor Amar's theory,[23] the key to the theory is a textual argument based upon the Framers' use of the word "all" to modify only the first three categories.[24] The Framers repeated "all" before each of the first three categories but not before any of the last six.[25]

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20. U.S. CONST. art. III, § 2, cl. 1.

21. *Id.*

22. *Id.*

23. *See Two Tiers, supra* note 1, at 210 ("Section III [of this Article] demonstrates the basic consistency of this two-tier neo-Federalist model with the provisions of the Judiciary Act of 1789 and every subsequent jurisdictional regime.").

24. *See id.* at 240 (arguing that the Framers' selective use of the word "all" implies that "although the judicial power must extend to all cases in the first three categories, it may, but need not, extend to all cases in the last six").

25. U.S. CONST. art. III, § 2, cl. 1:

> The judicial Power shall extend to *all* Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to *all* Cases affecting Ambassadors, other public Ministers and Consuls;—to *all* Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

(emphasis added).

Professor Amar therefore concludes that federal jurisdiction over the first three is mandatory (because the Constitution says jurisdiction shall extend to "all cases") but it is discretionary over the last six.[26] By "discretionary," Professor Amar means that Congress is free to remove such disputes from federal jurisdiction, something it cannot do with respect to the mandatory-tier disputes.[27] To understand the rest of this Note it will be essential to remember that the first three categories of jurisdiction that Article III calls "cases" are mandatory-tier disputes, while the last six categories, which are referred to as "controversies," are discretionary-tier disputes.[28]

### B. *Scholars Have Not Adequately Distinguished Between "Cases" and "Controversies"*

Despite the textualist commitment to the idea that "each word of the Constitution is to be given meaning,"[29] constitutional scholars generally do not distinguish between "cases" and

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26. *See Two Tiers*, *supra* note 1, at 208–10:

> In the first tier, comprising federal question, admiralty, and public ambassador cases, federal jurisdiction is mandatory: the power to hear all such cases must be vested in the federal judiciary as a whole. In the second tier, comprising categories of cases less critical per se to smooth national government, federal jurisdiction is discretionary with Congress.

27. *Id.* at 229–30:

> [T]he judicial power of the United States must, as an absolute minimum, comprehend the subject matter jurisdiction to decide finally all cases involving federal questions, admiralty, or public ambassadors . . . . [T]he judicial power may—but need not—extend to cases in the six other, party-defined, jurisdictional categories. The power to decide which of these party-defined cases shall be heard in Article III courts is given to Congress by virtue of its powers to create and regulate the jurisdiction of lower federal courts, to make exceptions to the Supreme Court's appellate jurisdiction, and to enact all laws necessary and proper for putting the judicial power into effect . . . . Congress's exceptions power also includes the power to shift final resolution of any cases within the Supreme Court's appellate jurisdiction to any other Article III court that Congress may create. The corollary of this power is that if Congress chooses to make exceptions to the Supreme Court's appellate jurisdiction in admiralty or federal question cases, it must create an inferior federal court with jurisdiction to hear such excepted cases at trial or on appeal . . . .

28. *Id.* at 244 n.128 (arguing that the distinction between "cases" and "controversies" has no substantive meaning beyond drawing an even clearer line between the mandatory and discretionary tiers of federal jurisdiction).

29. *Id.* at 242 (citing Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 334 (1816) ("It is hardly to be presumed that the variation in the language could have been accidental."); *cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.").

"controversies" in the Constitution.[30] If any distinction is made, it is typically in line with one of the following two interpretations, neither of which is satisfactory. The first interpretation, a minority position, is based on the assumption that "controversies" are a particular subgroup of "cases."[31] This view bases the distinction between "cases" and "controversies" on whether the dispute is civil or criminal.[32] It argues that "controversies" must refer only to civil disputes because many disputes in the six categories called "controversies" deal with states as parties, and common law tradition held that the courts of one sovereign could not enforce the criminal laws of another sovereign.[33] This approach defines the subject-matter-based "cases," on the other hand, as broadly as possible to encompass both civil and criminal disputes.[34] It is subject to two objections. First, why use such a roundabout way of expressing that seemingly simple concept?[35] If the Framers *really* meant "civil and criminal disputes" where they said "cases," and they meant "only civil disputes" where they said "controversies," why did they not just say that? Second, if the Framers used these terms rather than simply saying "civil" and "criminal," then why do they refer to "[t]he Trial of all *Crimes*" a few sentences later?[36]

30. *See e.g.*, CHEMERINSKY, *supra* note 19, at 6 (referring to disputes between a state, or its citizens, and a foreign country or its citizens as "cases" despite the fact that the Constitution refers to them as "controversies." U.S. CONST. art. III, § 2, cl. 1.); RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 326 (5th ed. 2003) (referring to all of the nine categories of jurisdiction as "cases" despite the fact that six of those are categories of "controversies" not categories of "cases." U.S. CONST. art. III, § 2, cl. 1.); *Two Tiers*, *supra* note 1, at 240 (failing to distinguish between cases and controversies by contending that "although the judicial power must extend to all cases in the first three categories, it may, but need not, extend to all *cases* in the last six") (emphasis added).

31. James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 599 ("I contend that the 'all Cases' reference in the Original Jurisdiction Clause incorporates not only the 'controversies' in which states appear as parties but also the "cases" that the menu describes as such.").

32. *Id.* at 607 ("Article III . . . distinguishes between 'cases' that embrace both civil and criminal proceedings and 'controversies' that apply to civil proceedings alone.").

33. *See id.* (arguing that the Framers defined "controversies" in a more limited way because at common law, courts lacked the power to enforce the criminal laws of another sovereign).

34. *Id.*

35. *See Reply*, *supra* note 1, at 1656–57 ("if the term 'controversies' simply means 'civil cases' the Framers could have said so with great ease").

36. U.S. CONST. art. III, § 2, cl. 3 (emphasis added).

The second interpretation resists distinguishing between the two terms at all[37] but, if pressed, bases the distinction on whether the dispute is defined by subject matter or party composition.[38] It says that "controversies" refers to the six categories of federal jurisdiction defined in Article III by their party composition, whereas "cases" refers to the first three categories, each of which is defined by its subject matter. This interpretation also fails. If it were correct, one would expect that each time Article III referred to a party-composition-based dispute, it would utilize the term "controversy." Yet, the Original Jurisdiction Clause refers to all "cases" "in which a state shall be a party."[39] The Framers could have written "all controversies in which a State shall be Party" confirming the subject-matter/party-composition argument. But they did not. This objection gains more traction in light of the fact that Article III does mention "controversies to which the United States shall be party,"[40] proving that the Framers *could* have used "controversies" in the Original Jurisdiction Clause, had they so desired. To answer this objection, the proponent of the subject-matter/party-composition view might say that when the Framers wrote of state-party "cases" in the Original Jurisdiction Clause, "cases" referred back to both "cases" and "controversies."[41] But if that is true, then the textualist commitment to giving every word in the Constitution meaning must be ignored because "controversies"

37. *See e.g.*, FALLON ET AL., *supra* note 30 at 13 (recognizing a "linguistically striking divide" between "cases" and "controversies" but explaining it only later and indirectly on the basis of the distinction between subject-matter and party-composition based jurisdiction); *Two Tiers, supra* note 1, at 244 n.128 (noting but discounting an interpretation that tracks the civil/criminal distinction).

38. *See* FALLON ET AL., *supra* note 30 at 14–17 (basing the difference between those things referred to in Article III as "cases" and those things referred to as "controversies" on whether the basis of jurisdiction is subject matter or party composition). Note that Professor Pfander also recognizes a distinction based on subject matter versus party composition. *See* Pfander, *supra* note 31, at 605.

39. U.S. CONST. art. III, § 2, cl. 2.

40. *Id.* cl. 1.

41. This is in fact what most scholars think. To take just one example, consider Professor Amar's statement that "'those cases in which a state shall be party' must refer to only a subset of the nine categories of cases and controversies spelled out in the menu . . . ." *Section 13, supra* note 11, at 489 (misquoting Article III, Section Two, Clause 2). Here, Professor Amar substantively misquotes the Constitution, incorrectly inserting "cases" between "those" and "in." The quote should read, "those in which a State shall be Party." U.S. CONST. art. III, § 2, cl. 2. Professor Amar's misquotation is material to this discussion because it takes the word "cases" in the Original Jurisdiction Clause to refer not only to "cases" but also to "controversies," failing to differentiate between the two distinct concepts. This passage, and the misquotation of the Constitution that it contains, are considered at length below. *See infra* notes 136–39 and accompanying text.

has no constitutional meaning independent of the term "cases." Therefore, both of the more generally accepted views of "cases" and "controversies" are unsatisfactory.

Note, also, that Professor Amar advanced a view—in a footnote to his 1985 article—that the Framers here employed two terms where one would suffice not because they meant to imply a substantive difference, but only to underscore their intention to make "cases" mandatory-tier disputes and "controversies" discretionary-tier disputes.[42] Criticism of this view is omitted here because it is considered and refuted at length later in this Note.[43] In sum, though, Professor Amar cannot reconcile the view that "cases" means mandatory-tier lawsuits while "controversies" means discretionary-tier lawsuits with his argument that state-party *cases* mentioned in the Original Jurisdiction Clause are part of the discretionary tier of federal jurisdiction.

### C. *The Intratextual Analysis*

The inconsistent use of the terms "cases" and "controversies" in Article III creates an interpretive riddle for the textualist. The term "cases" is repeated three times in a row in Article III, Section Two, Clause One,[44] followed by mention of six types of disputes referred to as "controversies."[45] A few sentences later, the Original Jurisdiction Clause reiterates Article III, Section Two, Clause One word for word: "In all cases affecting Ambassadors, other public Ministers and Consuls . . . the Supreme Court shall have original Jurisdiction."[46] Thus "cases"

42. *Two Tiers*, *supra* note 1, at 244 n.128 (noting but discounting an interpretation that tracks the civil/criminal distinction and arguing instead that "cases" and "controversies" were only meant to reiterate the distinction between the mandatory and permissive tiers of federal jurisdiction).

43. *See infra* notes 102–05, 131–32 and accompanying text.

44. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; . . . .").

45. *See id.*

> The judicial Power shall extend to . . . Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

46. *Id.* cl. 2.

is first repeated three times; then "controversies" refers to six types of disputes in a row; and then, confusingly, the Framers switch back to "cases" in the Original and Appellate Jurisdiction Clauses[47]—even repeating an earlier use of the term "cases" word for word.[48] Thus a puzzle arises: why did the Framers use two terms to describe legal disputes in Article III? Why did they switch back and forth? The two most common explanations or interpretations were discussed above but neither was found satisfactory. An intratextual analysis of the terms "cases" and "controversies" in Article III provides a more viable solution to this constitutional puzzle.

"Intratextualists read a word or phrase in a given clause by self-consciously comparing and contrasting it to identical or similar words or phrases elsewhere in the Constitution."[49] The assumption is that the same term should be interpreted the same way within the same document. Thus, a preliminary question vexes the interpreter: if the term "cases" is to be given a consistent meaning throughout Article III, to start the project requires some sort of initial definition. Obviously, one might simply turn to the dictionary to define words. However, as *McCulloch v. Maryland*[50] shows, constitutional context is often more helpful than the dictionary in understanding a word's constitutional meaning.[51] Professor Amar provides the key to unlocking this preliminary puzzle in his article on intratextualism[52] where he describes the intratextualist technique of using the Constitution itself as a dictionary for deriving the meaning of repeated words or phrases in the

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47. *See id.*

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

48. *Compare id.* cl. 1 ("The judicial Power shall extend to all Cases, . . . affecting Ambassadors, other public Ministers and Consuls") *with id.* cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls").

49. *Intratextualism, supra* note 6, at 748.

50. 17 U.S. (4 Wheat) 316 (1819).

51. *See Intratextualism, supra* note 6, at 756–57 (noting that in *McCulloch*, 17 U.S. (4 Wheat) 316, Chief Justice Marshall used the Constitution as "a kind of dictionary" to show "that 'necessary' can often mean useful").

52. *Intratextualism, supra* note 6.

Constitution.[53] Professor Amar's technique can be applied to "cases" and "controversies" in Article III. First, the term "cases" as used in Article III refers to federal question, admiralty and maritime, and ambassador disputes.[54] When providing for the final six categories of federal jurisdiction, the Framers refer to them as "controversies"—not "cases."[55] Thus, using the Constitution as a dictionary, the definition of "cases," for Article III purposes, is federal question, admiralty, or ambassador disputes.

This definition is confirmed two ways. First, after the Framers listed these subject-matter-based disputes, they listed the party-based disputes and called them "controversies."[56] From this one can gather that those things referred to as "cases" are not coincidentally called "cases," but are "cases" *as distinguished from* "controversies."

Second, comparing the wording of Article III, Section Two, Clause One to that of the Original Jurisdiction Clause shows that the Framers' use of two different terms was most likely intentional. Article III, Section Two, Clause One says:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to *all Cases affecting Ambassadors, other public Ministers and Consuls*;—to all cases of admiralty and maritime Jurisdiction . . . .[57]

Compare that to the Original Jurisdiction Clause, which says: "In all *Cases affecting Ambassadors, other public Ministers and Consuls*

53. *Id.* at 756–57 (noting that in *McCulloch,* 17 U.S. (4 Wheat.) 316, Chief Justice Marshall used the Constitution as "a kind of dictionary" to show "that 'necessary' can often mean useful").

54. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extended to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; . . . .").

55 *See id.*

> The judicial Power shall extend to . . . Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

56. *Id.*

57. U.S. CONST. art. III, § 2, cl. 1 (emphasis added).

and those in which a State shall be Party the Supreme Court shall have original jurisdiction."[58] Several lines of text separate these *in haec verba* passages.[59] Between them, the Framers refer to six categories of legal disputes in a row as "controversies" without mentioning the term "cases" once.[60] This precise repetition makes coincidence unlikely. Unless one concludes that the Framers were being careless with words, there is substantive difference between "cases" and "controversies" in Article III.

Having defined "cases," defining "controversies" is now less vexing because, following the intratextualist technique, the constitutional dictionary supplies the definition. "Controversies" are, according to Article III, the six party-defined disputes. They are: controversies (1) to which the United States shall be a party, (2) between two or more states, (3) between a state and citizens of another state, (4) between citizens of different states, (5) between citizens of the same state claiming lands under grants of different states, and (6) between a state, or the citizens thereof, and foreign states, citizens, or subjects.[61]

Contrary to common scholarly interpretation, careful reading reveals a certain degree of overlap between the otherwise distinct definitions of "cases" and "controversies." Some disputes that qualify as "controversies" fall under the mandatory tier because they involve federal questions, admiralty issues, or ambassadors.[62] Thus, some "cases" are also "controversies" and vice versa. This means that scholars who discuss Professor Amar's two-tiered theory, and Professor Amar himself, are incorrect to call all disputes that fall under one of the six controversy categories "discretionary."[63] In fact, many "controversies" are also "cases" and therefore fall within the mandatory tier.

58. *Id.* cl. 2 (emphasis added).

59. *Id.*

60. *Id.* cl. 1.

61. *Id.*

62. *Intratextualism, supra* note 6, at 762 (arguing that the mandatory tier is made up of cases upon which "Congress must allow federal courts to pronounce the last word [:] . . . federal question, admiralty, and ambassador-related cases").

63. *See e.g., id.* (arguing that the discretionary tier consists of "all diversity and other party-based lawsuits").

Thus, the Constitution recognizes three types of dispute: 1) "cases," 2) "controversies," and 3) "controversies" that are also "cases." An illustration of each is in order. An example of a pure case is a federal question case between citizens of the same state. It is a case because of the federal question.[64] It does not qualify as a controversy because it does not fit into one of the six party-defined controversy categories.[65] An example of a pure controversy is a contract dispute between two states. It is a controversy because it fits within the controversy category of "Controversies between two or more States."[66] It does not contain a federal question or an admiralty element, nor does it affect an ambassador or other public minister or consul. Thus, it is not a case.[67] Finally, a federal question dispute between two states exemplifies a controversy that is also a case. It is a case because of the federal question,[68] but it is also a controversy because of its party composition—a dispute between two states is a controversy.[69]

To summarize, "cases" refers to a subset of the legal disputes to which the judicial power of the United States extends, namely, federal question, admiralty, and ambassador disputes. "Controversies" refers to other categories of disputes, namely, those (1) to which the United States shall be a party, (2) between two or more states, (3) between a state and citizens of another state, (4) between citizens of different states, (5) between citizens of the same state claiming lands under grants of different states, and (6) between a state, or the citizens thereof, and foreign states, citizens, or subjects. The content of

64. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . .").

65. *See id.*

> The judicial Power shall extend to . . . Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

66. *See id.* ("The judicial Power shall extend to . . . Controversies between two or more States; . . .").

67. *See supra* notes 48–52 and accompanying text.

68. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . .").

69. *See id.* cl. 1 ("The judicial Power shall extend to . . . Controversies between two or more States . . . .").

the two subsets overlaps and this overlap reveals a more precise conceptualization of the disputes to which the federal jurisdiction applies. There are pure "cases," pure "controversies," and "cases" that are also "controversies."

## II. APPLYING THE DEFINITIONS OF "CASES" AND "CONTROVERSIES"

Applying these definitions to the clauses governing the Supreme Court's jurisdiction further illuminates the importance of distinguishing between "cases" and "controversies." The argument proceeds in two steps. The first step establishes that, based on the definitions of the terms "cases" and "controversies" argued for above, mandatory-tier disputes comprise the entirety of the Supreme Court's original and appellate jurisdictions. The second step explains which mandatory-tier disputes the Framers distributed to the Court's original jurisdiction and which they distributed to its appellate jurisdiction. Once these two steps are complete, a new vision of the Supreme Court's jurisdiction emerges.

### A. *Mandatory-Tier Disputes Comprise the Entirety of the Supreme Court's Jurisdiction.*

First, it is necessary to establish that mandatory-tier disputes comprise the entirety of the Supreme Court's jurisdiction. This can be proven as follows: (1) the Original and Appellate Jurisdiction Clauses refer only to "cases."[70] (2) Every dispute that is a "case" is a mandatory-tier dispute.[71] (3) Therefore, all disputes referred to in the Original and Appellate Jurisdiction Clauses are mandatory-tier disputes.

The Original and Appellate Jurisdiction Clauses refer only to "cases." The Original Jurisdiction Clause says: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and

70. *See* U.S. CONST. art. III, § 2, cl. 2:

> In all *Cases* affecting Ambassadors, other public Ministers and Consuls, and *those* in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other *Cases* before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.")

(emphasis added).

71. *See Two Tiers*, *supra* note 1, at 244 n.128 (arguing that the distinction between "cases" and "controversies" has no substantive meaning beyond drawing an even clearer line between the mandatory and discretionary tiers of federal jurisdiction); *id.* at 208–10 (arguing that everything Article III refers to with the term "cases"—federal question, ambassador, and admiralty "cases"—is part of the mandatory tier of federal jurisdiction).

those in which a State shall be Party, the supreme Court shall have original Jurisdiction."[72] When referring to state-party disputes the Original Jurisdiction Clause does not say the word "cases" explicitly and instead says "*those* in which a State shall be Party."[73] Does "those" necessarily mean "all cases"? "Those" is a pronoun, but what is its antecedent in the Original Jurisdiction Clause? There are only two choices: "cases" and "ambassadors."[74] It is irrational in English to speak of "ambassadors in which a State shall be Party," but it makes perfect sense to say "cases in which a State shall be Party." Furthermore, in the very next sentence, the Constitution provides that "[i]n all the other cases before mentioned . . . ."[75] The reference to "other cases" would not make sense if "those" referred to "controversies" rather than "cases." If the state-party disputes referred to in the Original Jurisdiction Clause were "controversies," then the phrase "in all the other cases before mentioned"[76] in the next sentence would be less clear because readers would not know what to do with the other "*controversies*" before mentioned. Thus, the word "those" refers to "cases," of which the Original Jurisdiction Clause lists two types: ambassador cases and cases in which a state shall be party.

The Appellate Jurisdiction Clause also only mentions "cases." It says: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[77] Therefore, "cases" comprise the entirety of the Supreme Court's jurisdiction—original and appellate. Notice, though, that some of those "cases" will also be "controversies."[78] However, every dispute in the Supreme Court's jurisdiction—regardless of whether it is also a controversy—is a mandatory-tier dispute by virtue of being a case. This is simple to prove. All "cases" are mandatory-tier

72. U.S. CONST. art. III, § 2, cl. 2.
73. *Id.* (emphasis added).
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *See supra* notes 56–63 and accompanying text.

disputes; this is Professor Amar's thesis.[79] Therefore, all "cases" that are also "controversies" are mandatory-tier disputes.

### B. *Distributing Disputes Between the Original and Appellate Jurisdictions (Informed by the Intratextual Analysis).*

Next, it is necessary to explain which mandatory-tier cases belong in the Supreme Court's original jurisdiction and which belong in its appellate jurisdiction. The Constitution divides the Supreme Court's jurisdiction into only two parts—the Court's original jurisdiction and its appellate jurisdiction.[80] Thus, if a case is part of the Court's jurisdiction, it is either in the Court's original or appellate jurisdiction. The Original Jurisdiction Clause refers to two categories of cases: ambassador cases and state-party cases. The Appellate Jurisdiction Clause then says, "[i]n all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction . . . ." Thus, some cases belong in the Court's original jurisdiction, and the remainder belongs in its appellate jurisdiction. Recall the definition of the term "cases"—legal disputes involving a federal question, an admiralty issue, or an ambassador, other public minister, or consul.[81] With an eye on that definition, reread the Original Jurisdiction Clause, plugging in that definition every time the word "cases" appears. The Clause itself singles out ambassador cases without reference to party.[82] Thus, state-party and non-state-party ambassador cases belong in the Supreme Court's original jurisdiction. To be clear, the term "cases," again, refers not only to ambassador disputes but also to federal question and admiralty disputes. However, by singling out ambassador cases, the Framers signal the exclusion of the other two types. Thus, "all Cases affecting Ambassadors, other public Ministers and Consuls" means all ambassador cases regardless of their party composition.

"[T]hose in which a State shall be Party,"[83] imposes no restriction on subject matter beyond that implied by the term

79. *See Two Tiers*, *supra* note 1, at 208–10 (arguing that everything Article III refers to with the term "cases"—federal question, ambassador, and admiralty "cases"—is part of the mandatory tier of federal jurisdiction).

80. U.S. CONST. art. III, § 2, cl. 2.

81. *See supra* notes 48–52 and accompanying text.

82. U.S. CONST. art. III, § 2, cl. 2.

83. *Id.*

"cases" (the antecedent of "those").[84] In other words, it does not single out ambassador, federal question, or admiralty subject matters. Instead, by using the term "cases," it implies a reference to all three subject matters. However, while "those in which a State shall be Party" implies no subject matter restriction, it does imply a party restriction in that there must be a state party. Thus, "those in which a State shall be Party," rightly understood, must mean "*cases*" in which a state shall be a party: federal question disputes with a state party, admiralty disputes with a state party, and ambassador disputes with a state party.[85]

The Appellate Jurisdiction Clause says: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction . . . ."[86] The question is, then: what are all the *other* cases before mentioned? Because the Original Jurisdiction Clause mentioned *some* "cases,"[87] it stands to reason that "all the other cases before mentioned" means all of the "cases" mentioned in Article III *except* those mentioned in the Original Jurisdiction Clause. Article III mentions three types of disputes that are "cases"—federal question, admiralty, and ambassador disputes.[88] From that set of disputes, subtracting those that comprise the Court's original jurisdiction leaves precisely those "cases" that belong in the Court's appellate jurisdiction.

Subtracting the disputes mentioned in the Original Jurisdiction Clause from the larger set of disputes that comprise the term "cases" in Article III as a whole, reveals that the Court's appellate jurisdiction is comprised only of non-state-party admiralty and non-state-party federal question "cases." Recall that the Court's original jurisdiction is comprised of all ambassador "cases" and all cases "in which a State shall be Party."[89] Removing ambassador "cases" from the group of disputes that comprise the term "cases" (federal question, ambassador, and admiralty disputes) leaves only federal question and admiralty disputes. Finally, removing the state-party "cases"—that is state-party federal question disputes, state-party

84. *See supra* notes 73–76 and accompanying text.

85. *See supra* notes 54–60 and accompanying text.

86. U.S. CONST. art. III, § 2, cl. 2.

87. *See id.* ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party").

88. *Id.* cl. 1.

89. *See supra* notes 81–85 and accompanying text.

ambassador disputes (these were already removed by the mention of all ambassador cases), and state-party admiralty disputes—leaves only non-state-party federal question and non-state-party admiralty cases in the Court's appellate jurisdiction.[90] The chart below provides a visual illustration of this distribution.

| Article III "Cases": | 1 | 2 | 3 | 4 | 5 | 6 |
|---|---|---|---|---|---|---|
| | Federal question disputes with a state party | Admiral-ty disputes with a state party | Ambassa-dor disputes with a state party | Federal question disputes without a state party | Admiral-ty disputes without a state party | Ambassa-dor disputes without a state party |
| Supreme Court's Original Jurisdiction: "In all cases affecting ambassadors . . . And those in which a State shall be Party . . . ." | X | X | X | | | X |
| Supreme Court's Appellate Jurisdiction: "In all the other Cases before mentioned . . . ." | | | | X | X | |

90. Here is a complete list of all "cases" discussed in Article III: (1) federal question cases with a state party, (2) federal question cases without a state party, (3) ambassador cases with a state party, (4) ambassador cases without a state party, (5) admiralty cases with a state party, and (6) admiralty cases without a state party. U.S. CONST. art. III, § 2, cl. 1. To determine which "cases" comprise the Court's appellate jurisdiction, remove from that list those that comprise the Court's original jurisdiction: all ambassador cases (with a state party and without a state party—numbers three and four in the list above) and (2) all cases with a state party (federal question cases with a state party, ambassador cases with a state party, and admiralty cases with a state party—numbers one, three, and five in the list above). *See id.* cl. 2 ("In all the *other* Cases before mentioned, the supreme Court shall have appellate Jurisdiction") (emphasis added). What remains are the cases that comprise the Court's appellate jurisdiction: (1) admiralty cases without a state party and (2) federal question cases without a state party—numbers two and six from the list above. Thus, the Original Jurisdiction Clause deals with numbers one, three, and five, and the appellate jurisdiction (made up of "all the other Cases before mentioned") is comprised of the remainder—numbers two and six.

## III. A CRITICISM OF PROFESSOR AMAR'S THEORY OF SUPREME COURT ORIGINAL JURISDICTION

This new theory of Supreme Court jurisdiction undermines Professor Amar's interpretation of the Original Jurisdiction Clause[91] and reveals why it is important to take the difference between "cases" and "controversies" seriously. Professor Amar, who acknowledges no substantive difference between "cases" and "controversies" for Article III purposes,[92] concludes that part of the Supreme Court's jurisdiction is discretionary—the part comprised of "cases" "in which a State shall be Party."[93] However, that conclusion is incorrect.

Professor Amar has discussed how his two-tiered theory results in his vision of the Supreme Court's original jurisdiction.[94] The majority view is that the Supreme Court's original jurisdiction is more or less set: *Marbury v. Madison*[95] says you may not add to it, and "subtractions are irrelevant because the Court can hear the cases [which fall within its original jurisdiction] despite the absence of statutory authority."[96] Professor Amar, to the contrary, concludes that Congress could virtually eliminate all Supreme Court jurisdiction, including its original jurisdiction, because the majority of the lawsuits that fall under the Court's original jurisdiction fall under Amar's discretionary tier of federal jurisdiction.[97]

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91. *See Section 13*, *supra* note 11.

92. *See infra* notes 125–42 and accompanying text. *But see Two Tiers*, *supra* note 1, at 244 n.128 (arguing that the distinction between "cases" and "controversies" has no substantive meaning beyond drawing an even clearer line between the mandatory and discretionary tiers of federal jurisdiction).

93. *See Section 13*, *supra* note 11, at 444 ("Congress does have authority, under the 'necessary and proper' clause, to reduce or even to eliminate the Supreme Court's original jurisdiction over lawsuits 'in which a State shall be Party.'").

94. *See id.* ("In the course of reaching these conclusions about the Supreme Court's original jurisdiction, I hope to do more than just tidy up a messy and rather technical corner of federal jurisdiction law. For once the Supreme Court's original jurisdiction is examined in context, larger themes of federal jurisdiction emerge.").

95. 5 U.S. (1 Cranch) 137, 174 (1803).

96. CHEMERINSKY, *supra* note 19, at 666.

97. *See Section 13*, *supra* note 11, at 479:

> But the two-tiered thesis also has interesting implications for the Supreme Court's original jurisdiction .... Indeed, half of the permissive tier categories fall within the Supreme Court's original jurisdiction over lawsuits 'in which a State shall be Party,' referring back to 'Controversies between two or more States; between a State and Citizens of another State; ... and between a State

Professor Amar bases his conclusion that the Supreme Court's original jurisdiction is partly comprised of discretionary-tier disputes on the assumption that the terms "cases" and "controversies" refer to the same things. It is true that discretionary-tier disputes may be removed from federal jurisdiction.[98] However, as was shown above, there are no discretionary-tier disputes within the Supreme Court's jurisdiction, which only extends to "cases."[99] Professor Amar does not dispute that the Original Jurisdiction Clause refers only to "cases."[100] He does argue, however, that the Framers intentionally used the terms "cases" and "controversies" to refer to the mandatory and discretionary tiers of federal jurisdiction respectively.[101] If, as Professor Amar claims, "cases" means "mandatory tier," then it is clear that—even according to his own arguments—there are no discretionary-tier disputes in the Court's original jurisdiction.

Professor Amar's admission that the term "cases" refers to the mandatory tier is sufficient to show—in light of the fact that the Original and Appellate Jurisdiction Clauses refer to "cases" exclusively and not to "controversies"—that there are no discretionary-tier disputes in the Court's jurisdiction. Yet ending the analysis there ignores Professor Amar's own argument to the contrary. While Professor Amar agrees that the Court's original jurisdiction clearly extends to "all Cases affecting

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> . . . and foreign States, Citizens or Subjects.' Given that such cases fall in the permissive tier, I argued that Congress could virtually eliminate all federal jurisdiction, including Supreme Court original jurisdiction, over them.

98. *See Two Tiers*, *supra* note 1, at 208–10:

> In the first tier, comprising federal question, admiralty, and public ambassador cases, federal jurisdiction is mandatory: the power to hear such cases must be vested in the federal judiciary as a whole. In the second tier, comprising categories of cases less critical per se to smooth national government, federal jurisdiction is discretionary with Congress.

99. *See supra* notes 70–79 and accompanying text. Professor Amar all but admits this when he argues that cases and mandatory-tier disputes are one and the same. *See Two Tiers*, *supra* note 1, at 244 n.128 (arguing that the distinction between "cases" and "controversies" has no substantive meaning beyond drawing an even clearer line between the mandatory and discretionary tiers of federal jurisdiction).

100. *See Two Tiers*, *supra* note 1, at 244 n.128 (arguing that the distinction between "cases" and "controversies" has no substantive meaning beyond drawing an even clearer line between the mandatory and discretionary tiers of federal jurisdiction). To be clear, while Professor Amar does not dispute that the Original Jurisdiction Clause refers only to cases, because he fails to distinguish cases from controversies, he *does* dispute whether all disputes in the Court's original jurisdiction are mandatory-tier disputes.

101. *Id.*

Ambassadors,"[102] he believes the "those" in "those in which a State shall be Party"[103] refers back only to "cases" and not "all cases" and for that reason concludes that the Framers intended the Supreme Court's original jurisdiction to extend only to *some* of the "cases" in which a state shall be party.[104]

He claims that "those" must refer back just to "cases" for three reasons. First, he says that if the Framers had wanted to say "all cases in which a State shall be Party," they could have easily just said it.[105] They repeated "all" in other parts of Article III very carefully—what reason is there to believe they are careless with it here? Second, they could have left "those" out, and the "all cases meaning" would have been clearer.[106] Third, he says that the "all cases" reading of the State-Party Clause would, taken alone, seem to mean that the Supreme Court has original jurisdiction in a purely state-law case brought by a state against its own citizens.[107] Yet, he says, "that surely cannot be right, for such a case does not even fall within the Article III jurisdictional menu, which limits the 'judicial power' to only nine categories of 'Cases' and 'Controversies' that federal courts may (and in some cases must) hear."[108]

First, his strained-reading criticism fails for several reasons. Professor Amar says that the Framers could have written "all those in which a State shall be Party," which is true. It is, however, plainly unnecessary and redundant when the pronoun refers back to "cases," which is itself modified by "all."[109] If one were to say, "bring me all foods that are fruits and those that are vegetables from the table," it would not make sense to return with all of the fruits and only some of the vegetables. One need not repeat "all" in order to effectuate the command. Further, the Original Jurisdiction Clause says that the Supreme Court "shall have original Jurisdiction."[110] Professor Amar, like most other constitutional scholars, interprets "shall" as "must."[111] He

102. U.S. CONST. art. III, § 2, cl. 2.
103. *Id.*
104. *Section 13, supra* note 11, at 480–81.
105. *Section 13, supra* note 11, at 480.
106. *Id.*
107. *Id.* at 481.
108. *Id.*
109. U.S. CONST. art. III, § 2, cl. 2.
110. *Id.*
111. *See Two Tiers, supra* note 1, at 239 n.118 (arguing and citing a wide range of authority for the proposition that "'shall' generally means 'must' in Article III").

might say that the Court "must" have jurisdiction over some state-party cases and not others, but, if that is so, how does one draw any coherent line between the mandatory-tier state-party disputes and the discretionary-tier state-party disputes?

Professor Amar often avoids using the term "state-party cases" even though his argument about the proper antecedent of "those" in the Original Jurisdiction Clause necessarily implies that "those" refers to "cases."[112] The only conflict he considers is whether "those" refers to "cases" alone or to "all cases." Under one reading, then, the Court's original jurisdiction would include "cases in which a State shall be Party," while under the other it would include "all cases in which a State shall be Party." Either way, "state-party *cases*" is an accurate description; and all of the disputes in the Court's original jurisdiction are "cases," which are mandatory-tier disputes, even according to Professor Amar. Yet, at one point Professor Amar says, "although Supreme Court original jurisdiction extends to 'all' ambassador cases, it does not explicitly extend to all *lawsuits* in which a state shall be party."[113] Despite the fact that he discussed only two options for the antecedent of "those"—*cases* and all *cases*—here he switches to a term the Constitution never uses—*lawsuits.*[114] Thus, as Professor Amar admits elsewhere, the Framers use the term "cases" to refer to mandatory-tier disputes, and yet he does not use that term when making an argument that "cases" are *discretionary*-tier disputes.[115] Thus, he uses the term "lawsuits"—which never appears in Article III—to disguise a textual inconsistency in his argument.

Perhaps Professor Amar would respond that in other parts of Article III, the Framers repeated "all," and thus not repeating it here is of special significance.[116] That argument fails for at least two reasons. In Article III, Section Two, Clause One, the Framers describe nine categories of disputes in complex phrases separated by semicolons, which makes repeating "all" necessary to underscore the fact that federal jurisdiction over them is

112. *See Section 13*, *supra* note 11, at 480–81 (arguing that "those" in the Original Jurisdiction Clause refers to "cases" rather than "all cases").

113. *Id.* at 480 (emphasis added).

114. *Id.*

115. *See Two Tiers*, *supra* note 1, at 208–10 (arguing that everything Article III refers to with the term "cases"—"federal question, ambassador, and admiralty "cases"—is part of the mandatory tier of federal jurisdiction").

116. U.S. CONST. art. III, § 2, cl. 1.

mandatory.[117] In the Original Jurisdiction Clause, on the other hand, there are only two elements discussed—ambassador and state-party cases—there is no need for semicolons, and therefore no need to repeat "all."[118] Thus, the differences in the sentences' structures account for the different uses of the word "all."

Second, Professor Amar argues that the Framers could have dropped "those" altogether if they had intended the "all cases" reading.[119] However, "those" was used to avoid a potential confusion: "in which a State shall be Party"[120] might incorrectly be read to refer to "*controversies*"—part of the discretionary tier.[121] Just as they were abundantly careful above—repeating "all" three times in a row[122]—here, the Framers underscored their desire to refer to state-party "cases" and not to state-party "controversies" by repeating the term "cases," albeit through a pronoun reference.[123] Nevertheless, even the most textually sensitive constitutional scholars miss this point because they do not properly distinguish between "cases" and "controversies."[124] Furthermore, if the Framers had dropped "those" so that the Original Jurisdiction Clause read, "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls and in which a State shall be Party, the supreme Court shall have original Jurisdiction," it would also appear that "in which a State shall be Party" referred to a subset of cases affecting ambassadors, other public ministers and consuls. This is not the reading for which Professor Amar or any other scholar argues.

Regarding Professor Amar's third objection that the "all cases" reading of the State-Party Clause would, taken alone, seem to mean that the Supreme Court has original jurisdiction in a purely state-law claim brought by a state against its own citizens,[125] this objection reveals most clearly where Professor

117. *Id.*

118. *Id.* cl. 2.

119. *Section 13*, *supra* note 11, at 480.

120. U.S. CONST. art. III, § 2, cl. 2.

121. *See Section 13*, *supra* note 11, at 479 (implying that the discretionary or "permissive" tier of federal jurisdiction is comprised of disputes referred to in Article III as "Controversies"); *Two Tiers*, *supra* note 1, at 244 n.128 (arguing that "controversies" refers to discretionary-tier disputes).

122. U.S. CONST. art. III, § 2, cl. 1.

123. *Id.*

124. *See infra* notes 125–42 and accompanying text.

125. *Section 13*, *supra* note 11, at 481.

Amar's theory diverges from the intratextual reading presented in this Note. It also reveals the extent of Professor Amar's belief that there is no distinction between "cases" and "controversies." He argues that the Court cannot possibly have jurisdiction in a purely state-law claim brought by a state against its own citizens "for such a case does not even fall within the Article III jurisdictional menu, which limits the 'judicial power' to only nine categories of 'Cases' and 'Controversies' that federal courts may (and in some cases must) hear."[126] Professor Amar refers to all nine jurisdictional categories in Article III as "cases," ignoring the fact that the Constitution refers to only three of them as "cases" and the other six as "controversies."[127] It was Professor Amar who said that we must give meaning to each word in the Constitution, ignoring none.[128] Yet, here he does not heed his own advice, and as a result he comes to the mistaken conclusion that the Supreme Court could not have original jurisdiction over a state-party "case" when the Constitution plainly says the exact opposite.

As another example of Professor Amar's belief that "cases" and "controversies" should be distinguished, consider this passage:

> But once we keep in mind the centrality of the jurisdictional menu it becomes clear that even if the Supreme Court does have original jurisdiction over 'all' cases in which a state shall be party, that jurisdiction is itself qualified by the language of the menu. And the menu pointedly fails to require federal jurisdiction over 'all' state-diversity cases, *in sharp contrast to its treatment of mandatory tier cases—that is, ambassador, arising under, and admiralty cases.*"[129]

Here, Professor Amar refers to "state-diversity cases" as though they are a separate class of "cases" from "mandatory tier cases—that is, ambassador, arising under, and admiralty cases."[130]

126. *Id.*

127. U.S. CONST. art. III, § 2, cl. 1.

128. *Two Tiers*, *supra* note 1, at 242 (citing Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 334 (1816) ("It is hardly to be presumed that the variation in the language could have been accidental."); *cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.").

129. *Section 13*, *supra* note 11, at 481 (emphasis added).

130. *Id.*

However, under the interpretation this Note espouses, all state-diversity "cases" are part of the mandatory tier of federal jurisdiction, not because of the state-diversity feature, but because they are "*cases*."[131] The distinction between "cases" and "controversies" makes all the difference as "cases" refers to the mandatory tier of federal jurisdiction—federal question, admiralty, and ambassador cases—with or without a state party. In other words, it is not as though a federal question case suddenly moves from the mandatory to the discretionary tier simply because there happens to be a state party. As emphasized above, Professor Amar himself argued elsewhere that the Framers employed the term "cases" specifically to refer to the mandatory tier as distinguished from "controversies," which was meant to refer to the discretionary tier.[132] Thus, when the Constitution provides for "cases" "in which a State shall be Party," it refers to mandatory-tier disputes.

Perhaps the best example of Professor Amar's misreading of the Original Jurisdiction Clause comes late in a section of *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court* entitled "Fourth Question: Do 'Cases . . . In Which a State Shall be Party' Encompass More Than the Three State-Diversity Categories of the Jurisdictional Menu?"[133] The fact that Professor Amar found this question sufficiently complex to warrant making it a section title indicates a misunderstanding of the terms "cases" and "controversies." The answer, under the theory this Note puts forward, is clearly and simply "yes." While "[i]n which a State shall be Party" might appear, at first glance, to be a reference to the three state-diversity categories of federal jurisdiction, the term "cases" is a clear reference to the mandatory tier of federal jurisdiction—federal question,

131. Professor Amar is plainly referring to the "discretionary tier" disputes when he says, "And the menu pointedly fails to require federal jurisdiction over 'all' state-diversity cases . . . ." *Id.* Yet he refers to them as "cases"—a term that is used in Article III to refer to mandatory-tier disputes exclusively. U.S. CONST. art. III, § 2, cl. 1; *see also Reply, supra* note 1, at 1657 (recognizing that "the judicial power shall extend to 'all' . . . cases in the first tier, but not necessarily all . . . controversies in the second"); *Two Tiers, supra* note 1, at 244 n.128 (arguing that the distinction between "cases" and "controversies" has no substantive meaning beyond drawing an even clearer line between the mandatory and discretionary tiers of federal jurisdiction).

132. *See Two Tiers, supra* note 1, at 244 n.128 (arguing that the distinction between "cases" and "controversies" has no substantive meaning beyond drawing an even clearer line between the mandatory and discretionary tiers of federal jurisdiction).

133. *Section 13, supra* note 11, at 488.

admiralty, and ambassador "cases."[134] Thus, the most sensible conclusion is that "cases" "[i]n which a State shall be Party" refers to that subset of federal question, ambassador, and admiralty "cases" that has a state party. Professor Amar fails to take into account the overlap between "cases" and "controversies"[135] in that he appears to believe that no dispute between two states could *also* be a federal question, admiralty, or ambassador dispute. However, if the subject matter is a federal question, admiralty, or an ambassador issue, then, yes, jurisdiction is mandatory—even if there is a state party.

Professor Amar develops his answer to the "Fourth Question" of his section-heading as follows: "[o]nce we properly recognize that 'those cases in which a state shall be party' must refer to only a subset of the nine categories of cases and controversies spelled out in the menu, two possibilities remain."[136]

Note that here Professor Amar misquotes Article III, Section Two, Clause Two.[137] His quotation "'*those cases* in which a state shall be party' must refer to only a subset of the nine categories of *cases and controversies* . . . " wrongly inserts "cases" between "those" and "in." This should not be ignored as a mere scrivener's error. Rather, it is a substantive misquotation that is highly material to this discussion. The error takes the word "cases" in the Original Jurisdiction Clause to refer not only to "cases" but also to "controversies," thereby merging the two distinct concepts. This misquotation is a prime illustration of how Professor Amar and other commentators fail to give a separate meaning to both "cases" and "controversies."

Filling out his argument, Professor Amar describes what he thinks are the only two remaining interpretive possibilities:

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134. *Two Tiers*, *supra* note 1, at 244 n.128 (arguing that the distinction between "cases" and "controversies" has no substantive meaning beyond drawing an even clearer line between the mandatory and discretionary tiers of federal jurisdiction).

135. In *Two Tiers*, *supra* note 1, at 244 n.128, Professor Amar rejects the civil/criminal distinction between "cases" and "controversies," arguing that the only reason the Framers used two words where one would suffice was to draw an even clearer line between the mandatory and discretionary tiers of federal jurisdiction. Yet, in the title of the section from his article mentioned above, he refers to discretionary-tier disputes as "cases," contradicting his argument that "cases" was meant to refer to the mandatory tier while "controversies" was meant to refer to the discretionary tier.

136. *Section 13*, *supra* note 11, at 489.

137. *Compare* U.S. CONST. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors . . . and *those in* which a State shall be Party . . . ") (emphasis added), *with Section 13*, *supra* note 11, at 489 ("'those *cases* in which a state shall be party'") (emphasis added).

> First, the clause could be read to authorize original jurisdiction in any of the nine categories whenever a state happened to be a party. Under this 'literal' reading, for example, a federal question suit brought by a state against its own citizen would fall within the Court's original jurisdiction. Second, the clause could be read simply to allow original jurisdiction only where the suit falls within the menu because the state is a party—i.e., only where the lawsuit is one 'between two or more States;—between a State and Citizens of Another State; . . . [or] between a State . . . and foreign States, Citizens or subjects.' Under this 'state-diversity' reading, a federal question suit by a state against its own citizens could not be brought originally in the Supreme Court, although that Court could hear the case on appeal.[138]

Professor Amar, however, does not account for a third possibility because his analysis assumes that when the Constitution says "cases," it means "cases or controversies." Look at Professor Amar's first possible interpretation. He says the clause could be read to authorize jurisdiction in any of the nine categories whenever a state happens to be a party. However, only *three* of the nine categories are called "cases" in Article III—the other six are called "controversies." Professor Amar's second possible interpretation above—what he calls the "state-diversity" reading—applies the clause only to disputes referred to as "controversies" in Article III. This contravenes the Original Jurisdiction Clause itself, which refers not to "controversies in which a State shall be Party," but to "cases" "in which a State shall be party." As has been argued extensively above, there is a difference between "cases" and "controversies."[139] That difference reveals that the text might mean exactly what it says: state-party cases means "cases" (federal question, ambassador, and admiralty disputes) with at least one state party. Professor Amar's failure to distinguish between "cases" and "controversies" causes him to overlook this possibility.

A final example should make it clear that Professor Amar is not being taken out of context. Later in the same article he says, "we find a fundamental distinction between mandatory tier cases

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138. *Section 13, supra* note 11, at 489.

139. *See supra* notes 46–69 and accompanying text.

defined by subject matter of lawsuits and permissive tier cases defined by party status."[140] Here, Professor Amar repeats his belief that because all "cases" are mandatory-tier disputes, all "controversies" (or party-defined suits) are discretionary-tier disputes.[141] As argued above, some party-defined disputes are in fact mandatory-tier disputes.[142] Professor Amar says "each word of the Constitution's text must be given meaning."[143] Yet, he fails to give every word of the Constitution's text meaning by failing to distinguish between "cases" and "controversies."

## IV. SHOULD PROFESSOR AMAR'S THEORY BE ACCEPTED OR REJECTED?

This Note has assumed that Professor Amar's two-tiered theory and his brand of intratextualism are correct. Using his own arguments and theories as tools, it has attempted to level a textual attack on his theory of the Supreme Court's original jurisdiction. However, given the modern state of Supreme Court litigation, it seems implausible that the interpretation of its jurisdiction put forward in this Note could ever be put into practice. First of all, under this interpretation, the Court's appellate jurisdiction would be drastically curtailed.[144] Not only would that make Supreme Court litigation exceedingly difficult, it would take power away from Congress, which has the power under the Exceptions Clause to remove cases from the Court's appellate jurisdiction but not from its original jurisdiction.[145] Second, this Note's interpretation greatly expands the scope of the Court's original jurisdiction by reading "those in which a State shall be Party" to mean state-party federal question, state-party admiralty, and state-party ambassador "cases." For both political and practical reasons, then, this conclusion is unlikely

140. *Section 13*, *supra* note 11, at 489.

141. *Two Tiers*, *supra* note 1, at 244 n.128 (arguing that the term "cases" refers to the mandatory tier of federal jurisdiction and the term "controversies" refers to the discretionary or permissive tier of federal jurisdiction).

142. *See supra* notes 62–69 and accompanying text.

143. *Two Tiers*, *supra* note 1, at 242 (citing Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 334 (1816) ("It is hardly to be presumed that the variation in the language could have been accidental."); *cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.").

144. *See supra* notes 89–90 and accompanying text.

145. U.S. CONST. art. III, § 2, cl. 2.

to be put into practice any time soon, regardless of any textual attractiveness it might have.

This does not mean that Professor Amar is correct in concluding that the Supreme Court's original jurisdiction is made up partly of discretionary-tier disputes. If it is true that no word in the Constitution should be read as surplusage, as he and most textualists argue,[146] then his reading simply cannot be correct. If interpretive theories that appeared inexpedient or impractical were immediately tossed aside, then constitutional law would acquiesce to political power and modern trends. There is a need for theories that reveal new insights into the Constitution's text or history regardless of their likelihood of soon being adopted by the Court.

This Note's conclusion that none of the modern interpretations of "cases" and "controversies" is satisfactory under close scrutiny is perhaps even more important than revealing a great tension in Professor Amar's interpretation of the Original Jurisdiction Clause. Hopefully, this Note will draw some attention to the fact that these terms have been neglected in constitutional scholarship, compelling scholars like Professors Amar, Pfander, and Meltzer, who have attempted to distinguish these terms (or who have attempted to explain why they should not be distinguished), to address some of the objections raised in this Note. Beyond that, it might prompt others interested in textualism to bring fresh eyes and insights to this constitutional riddle.

In the final analysis, then, this Note calls not for a revolution in Supreme Court jurisdiction, but instead for scholars to continue to try to distinguish between "cases" and "controversies," or to find historical evidence that will show conclusively that the Framers were simply careless when they used two words where one was sufficient. If that evidence should arise, then textualists should retract what has been put forward as a truism: that we must give meaning to each word of the Constitution's text, reading none as surplusage.[147]

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146. *Two Tiers*, *supra* note 1, at 242 (citing *Hunter's Lessee*, 14 U.S. (1 Wheat.) at 334; *cf. Marbury*, 5 U.S. (1 Cranch) at 174 (1803).

147. *Id.*

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